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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-

INDIANA & MICHIGAN ELECTRIC COMPANY
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 599 F.2d 185 and appears in the Appendix hereto at pp. 1a-13a. The Court's denial on July 11, 1979, of the Petitioner's motion for rehearing appears in the Appendix hereto at pp. 14a-15a. The Supplemental Decision and Order of the National Labor Relations Board is reported at 235 NLRB No. 159 (1978), and appears in the Appendix hereto at pp. 16a-20a. The initial

Decision and Order of the National Labor Relations Board and the decision of the Administrative Law Judge is reported at 229 NLRB 582 (1977) and appears in the Appendix hereto at pp. 21a-51a.

JURISDICTION

The Judgment of the Court of Appeals for the Seventh Circuit was entered on May 21, 1979. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on July 11, 1979, and this petition for certiorari is being filed within 90 days of that date. The Court's jurisdiction is being invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

1. Whether the Labor Board under Section 8(a)(5) of the Act may compel employers alternatively (1) to release employees from work to engage in collective bargaining in bargaining units other than the unit in which they are employed, or (2) to bargain during nonworking time, *i.e.*, at nights and on weekends, in circumstances where it has been found that such release of employees would be burdensome on the employer, that bargaining during nonworking hours would be inefficient, and where the employer's refusal to accept either alternative was not unlawfully motivated but rather was advanced for bona fide operational reasons.

(a) Whether the Labor Board action described above contravenes the direction in Section 8(d) of the Act that the duty to bargain obligation "does not compel either party to agree to a proposal or require the making of a concession."

(b) Whether the Labor Board action described above extends the bargaining obligation beyond the unit found appropriate for bargaining in violation of Section 8(a)(5) of the Act, as limited by Section 9(a) of the Act.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

"Section 158(a) It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

"Section 158(d) [in pertinent part] For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession."

Section 159(a) [in pertinent part] "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment."

STATEMENT OF THE CASE

This case involves an order by a divided Labor Board, enforced by a divided Court of Appeals, holding that an Employer must either grant employees time off from work to engage in collective bargaining negotiations for units *outside* of

the bargaining units in which they were employed or must hold such negotiations outside normal working hours.

The Employer is a public utility engaged in the generation, transmission and distribution of electrical power in the States of Indiana and Michigan. Local 1392 of the International Brotherhood of Electrical Workers is the exclusive collective bargaining agent for the Company's employees in four separate and distinct bargaining units—(1) the Fort Wayne unit; (2) the Marion-Muncie unit; (3) the South Bend, Benton Harbor and Twin Branch unit; and (4) the General Office unit. The bargaining relationship between the parties is longstanding, with the Employer first recognizing the Union as the representative of its Fort Wayne employees in 1934.

In 1971, the union filed a petition with the National Labor Relations Board seeking to consolidate the four separate bargaining units into a single system-wide bargaining unit for all employees of the Employer represented by the Union. After the Board dismissed this petition on the ground that the separate bargaining units were appropriate for purposes of collective bargaining, the Union, through its internal processes, merged the predecessor local unions, which had separately represented the various units, into a single union—Local 1392 of the International Brotherhood of Electrical Workers. The Employer acquiesced in the merger on the basis that it was an internal Union matter, but expressly cautioned that the internal merger would have no effect on the separate bargaining units or practices which had previously been recognized.

In the 1975-1976 round of negotiations with the Union, the four Union contracts for the respective units expired at different times between October 31 and December 31, 1975. The parties set separate initial schedules for negotiations in each unit.

Bargaining started on September 23, 1975, in the South Bend, Benton Harbor and Twin Branch unit. The Union bargaining committee consisted of a representative of the International Union, a representative of the Local Union (both

of whom were full-time Union employees), three Company employees employed in the unit in which bargaining was taking place, and four Company employees employed in the units other than the unit in which bargaining was taking place (the "travelers").[1] The make-up of the Union bargaining committee for the October 1, 1975, initial session for the Marion-Muncie unit, and the October 8 and 9, 1975, subsequent negotiations in the South Bend, Benton Harbor and Twin Branch unit was similar even though the individuals were not the same. At each of these sessions, in addition to the travelers, the two full-time Union representatives and an average of four employees from the unit in which the bargaining was taking place were present on behalf of the Union.

At the conclusion of the bargaining session on October 9, 1975, the parties discussed the future schedule of negotiations in each of the four units. A schedule of eleven future dates was agreed upon among the four units.

Shortly after this agreement, one of the travelers—Lyle VanAman—a troubleshooter on shift work in the Fort Wayne unit, requested to be off work on all eleven dates. Upon receipt of this request, the Employer re-examined its policy with respect to the traveling negotiators.

The Employer had not been particularly concerned up to this time with the issue of travelers because, in past negotiations, the practice was that the travelers would show up for one or two of the initial meetings and then attend no further meetings. In this regard, prior to the VanAman request, no "traveler" had ever sought time off for more than two days.

Faced with Mr. VanAman's request, the Employer reconsidered its policy and decided to deny Mr. VanAman's request to

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[1] The term "travelers" refers to those employees on the Union's negotiating committee who attended the negotiations by traveling from distant locations where they were employed to attend the negotiations. These distances ranged from 136 miles to 266 miles on a roundtrip basis. See ALJ's Opinion at Appendix p. 34a.

be absent from work to attend any bargaining sessions other than the bargaining sessions scheduled for the Fort Wayne unit in which he was employed. This decision was based upon the long list of meetings that were scheduled and the large number of employees who had attended the previous four meetings in 1975 in conjunction with the fact that it would be difficult to regularly replace such skilled employees as VanAman who worked shifts and whose schedules would have to be changed as would that of their replacements. The Employer concluded that unless its policy was modified to meet the expanded requests of the Union, its obligation to serve the public as a utility would be detrimentally affected.[2]

The Union aborted the next scheduled bargaining meeting on October 29, 1975, in the South Bend, Benton Harbor, and Twin Branch unit on the basis that their full bargaining committee, including Mr. VanAman, had not been excused by the Company to attend.

Thereafter the Union requested that the Company bargain outside normal working hours on the basis that "due to inflationary pressures, the employee members of the committee can no longer afford to lose time from work in order to negotiate agreements". The Company responded that night and weekend bargaining would not be beneficial to either side and that it would be unfair to require the participants to engage in such bargaining following a full day's work or to take away from their weekend activities. At the same time, the Employer indicated that, as in the past, it would bargain after hours or on weekends to meet contract deadlines or when an agreement was in sight.

Following the issuance of a complaint by the Board's Regional Director in January 1976, the Company rescinded its

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[2] The Employer also concluded that the Union's sole purpose in seeking traveling negotiators was to facilitate and achieve a forced *de facto* merger of the four units into a single unit. In the instant case, the Board in its supplemental decision found evidence of unlawful coordinated bargaining to be wanting, notwithstanding the Union's expressed intentions to achieve that goal.

policy prohibiting the release of travelers for the purpose of having the negotiations resumed while, at the same time, expressly preserving its legal position that it had not violated the Act.

The Board's Administrative Law Judge dismissed the complaint in its entirety. He concluded generally that the Employer's actions were not unlawfully motivated or "for reasons other than nondiscriminatory, perceived bona fide operational needs" (App., p. 46a at n. 31). He specifically concluded (1) that the release of VanAman "would interfere with the operations of his work crews during the period of negotiations as well as two-way travel" (App., p. 34a); (2) that the release of the employee negotiator travelers "would have been 'burdensome to administer'" (App. pp. 34a-35a); and (3) that bargaining during nonworking hours "would be deleterious to their [employees and supervisors involved in bargaining] performance and morale and to the efficiency of Respondent's operations" (App., p. 38a).

He correctly analyzed the issue as a conflict between the generally recognized right of a Union to negotiate collectively through representatives of their own choosing and the principle that employees do not have an unfettered right to require that negotiations be carried on in a way that disrupts or interferes with the conduct of their employer's business. In concluding that the complaint should be dismissed, the ALJ reasoned that the issue does not lend itself to a hard and fast rule and that excessive regulatory policing of such matters would be counter-productive to the Act's aim of promoting industrial peace through collective negotiations (App., pp. 45a-51a).

While adopting all of the ALJ's Findings of Fact, including the lack of antiunion animus in the modification of its travel policy for non-unit employees, the Board swept aside the ALJ's reasoned judgment that the parties should be left to negotiate this issue and be given the opportunity to accommodate their

respective positions. The Board majority established a novel *per se* test of an employer's good faith. When faced with a union request that employee negotiators be released from work to engage in bargaining in units outside the unit in which they are employed, the employer must either (1) accede to such request, regardless of the number of employees involved in the request, regardless of the employer's need for such employees, regardless of the amount of time involved in the request, and regardless of the distances or bargaining units where the bargaining is to take place, or (2) agree to bargain at nights or on weekends. Because of the *per se* nature of the rule announced by the Board, the evidence concerning the hardship on the employer in following either course of action was deemed irrelevant.

Board Member Walther dissented from the majority panel of Members Jenkins and Murphy, asserting that the complaint should be dismissed for the reasons stated by the ALJ, particularly in light of his finding that the employer's actions were nondiscriminatory and based upon valid business considerations.

The Court of Appeals for the Seventh Circuit granted enforcement of the Board's Order. Judge Harlington Wood, Jr., filed a dissenting opinion in which he recognized that the Board's decision created a new right inuring to Unions, which had, heretofore, been a matter of collective negotiation between unions and employers. He concluded that the Board's *per se* approach both eliminates the employer's right to bargain over the conditions under which collective bargaining is to take place and its concomitant right to take into consideration the needs of its business in establishing those conditions.

The Employer's petition for rehearing and suggestion for rehearing *en banc* was denied with three of the eight active Judges of the Seventh Circuit voting to grant the request for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

I

The Decision Below Raises Significant And Recurring Problems Concerning The Ability Of Employers To Bargain On The Conditions Under Which Collective Bargaining Is To Take Place And Conflicts In Principle With Decisions Of This Court And With The Act Itself

Section 8(d) of the National Labor Relations Act, as amended in 1947, in defining the statutory duty to bargain in good faith, specifically states that the "obligation does not compel either party to agree to a proposal or require the making of a concession".

In a series of cases since its enactment in 1947, this Court has consistently rejected efforts by the Labor Board to translate an employer's refusal to agree to a Union proposal or to make a concession on substantive collective bargaining terms into a *per se* violation of the good faith bargaining requirement of Section 8(a)(5). *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952) (employers refusal to make a concession on its "management rights" proposal was not a violation of Section 8(a)(5)); *H.K. Porter Company v. NLRB*, 397 U.S. 99 (1970) (employer's refusal to agree to Union "dues check off" clause was not a violation of Section 8(a)(5)). Central to the reasoning of these opinions was this Court's adherence to the important Congressional mandate and philosophy of Section 8(d) that private bargaining between employers and unions should be essentially free of governmental supervision with respect to all mandatory subjects of bargaining.

The only real difference in the present case is that the Board here has attempted to compel an employer to accede to Union demands concerning the equally important issues of what employees, if any, the employer will release to engage in

collective bargaining and under what conditions, if any, such employees will be released and whether bargaining will take place during working hours or outside of normal working hours. On these issues, which are fundamental entry points to the entire substantive collective bargaining process, the Board has decreed across-the-board for American industry at large that employers either (1) *must* agree to let unlimited numbers of employees off from work, as requested by unions, to engage in unlimited numbers of collective bargaining negotiations, as determined by unions, in unlimited numbers of bargaining units, as determined by unions, or (2) *must* agree to bargain during nonworking hours, i.e., at nights or weekends.

This Hobson's choice is visited by the Board on American industry despite factual findings of the Administrative Law Judge, undisturbed by either the Board or the Court, that such a general release of employees from their normal work would, at least in this case, interfere with normal Company operations and be burdensome to the employer, and that bargaining at nights or on weekends would be deleterious to the performance of employees and of management personnel and to the efficiency of the Company's operations.[3]

Such findings serve only to illustrate to this Court the breadth and *per se* nature of the rule the Board now finds implicit in the Act for the first time in the thirty-two years that Section 8(d) in its present form has been on the books.

The difference cited above between the present case, which deals with the terms and conditions under which bargaining is to take place, and the previous cases in this Court dealing with the substantive terms and conditions of agreements, requires no

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[3] The Company involved in this case is a large public utility—a classic example of a "business affected with a public interest" (*Munn v. Illinois*, 94 U.S. 113 (1877)). As such, it has a primary duty to its consumers and to the public at large to provide uninterrupted and efficient services. Factors tending to interfere with operations or make them less efficient have adverse public as well as private consequences.

different result. The Fifth Circuit has recently held that matters preliminary to the actual substantive collective bargaining, such as the issue of whether employee negotiators should be paid for time spent in bargaining, are, themselves, mandatory subjects of bargaining. *Axelson, Inc. v. NLRB,* ____F.2d____, 101 LRRM 3007 (5th Cir. 1979), enforcing 234 NLRB No. 49 (1978). This means that neither employer nor union can unilaterally decree the conditions under which bargaining is to take place, but each is under an obligation to bargain about such matters to the point of agreement or impasse. More to the point of this case, it means that the Labor Board cannot require agreement or concessions by either party on these subjects, as it has done here.

The practical significance and importance of the Board's attempted intrusion into this area that Congress left to resolution through the private process was best described by the Administrative Law Judge in this case:

> "More basically, I consider it neither necessary nor advisable—if, indeed, practicable or even possible—to design a master-rule as to just how many days, hours, and travel miles should be allowable or allowed for how many employees in how many categories in how many places who may desire to participate in future negotiations between the parties involving units to which they do not belong. The factual permutations and combinations are so extensive and the factors involved so numerous and discrete, as to elude precise or practical formularization. One of the Act's core purposes is promotion of industrial peace through encouragement of collective bargaining. I believe that purpose would be ill served by attempted ritualization here of the methodology of future collective negotiations between the parties. Rather than promoting the policies of the Act, it would seem that such an attempted ritualization, even if it could be achieved, would

> create an impaction to the desirably supple peristalsis of collective negotiation." (App., pp. 46a-47a) (Footnotes omitted.)

In short, this admittedly novel interpretation of the Act will plunge the Board and the federal court system into the business of deciding by some type of "master-rule"—or, more realistically—several different master-rules, each with their exceptions and exceptions-to-the-exceptions, the basic conditions under which the parties will engage in collective bargaining. Nor is the range of such subjects limited to the issues of time off for employee negotiators, the conditions, if any, under which employees will be released, and whether bargaining will take place during normal working hours that are involved in this case. They also include whether employee negotiators will be paid for time spent in bargaining; whether bargaining will take place on plant premises or at a neutral site; and any number of other issues preliminary to starting the actual negotiations.

The dissenting opinion of Judge Wood clearly perceived the watershed shift in bargaining power represented by the Board's attempted imposition of a "master rule":

> "There was no collective bargaining agreement negotiated between the union and the Company permitting employees to take time off to bargain outside their units at other locations. With this case as precedent, there will no longer be any need for a union to bargain on that issue. The Company has lost any right to bargain for some reasonable control or limitation on the practice. The Union has gained a new bargaining tactic subject to obvious abuse. No limitation is placed on the number of employees nor the amount of time off that the Union can now impose on an employer against its business judgment." (App. p. 12a)

But the Board's *per se* rule impacts not only on those employers which have no agreement on these subjects. It also impacts on those employers which do have agreements with

their unions on these subjects.[4] The healthy variety of individual accommodations reached by employers and unions must logically fall before the sweeping *per se* rule enunciated by the Board.[5] To the extent that the Board's rule favors union interests more than the agreements they have negotiated with employers on those subjects, the unions will naturally opt to forego seeking agreements on these subjects and rest upon the "master-rule" that the Board has now discovered for the first time in its forty-five year history.[6]

The "alternative" offered by the Board to granting unlimited time off for employees to move around the country engaging in collective bargaining in units outside their own bargaining unit is for the employer to bargain during nonworking hours at

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[4] A 1979 study by the Bureau of Labor Statistics of 1570 collective bargaining agreements covering more than 1000 bargaining unit employees revealed that 933 of those contracts provide for some type of leave of absence for Union business. Of these 1570 agreements, 817 contained some form of pay for time spent on Union business, ranging from contract negotiations to the more prevalently provided reimbursement for grievance/arbitration matters. See pertinent portions of Characteristics of Major Collective Bargaining Agreements, July 1, 1976, attached hereto at Appendix pp. 53a-54a. Naturally, the type of leave and reimbursement provisions varies from contract to contract as indicated by the Bureau of National Affairs sampling from its Collective Bargaining Negotiations and Contracts series (CBNC)(1976) attached hereto at Appendix pp. 55a-57a.

[5] In purporting to follow the decision of the Court below an Administrative Law Judge of the Labor Board has already ruled that where a Company and Union have a lawful contractual provision limiting Union leaves of absence to a specified period of time in which to transact *local* union business, the employer must grant *additional* unlimited uncompensated leave for employees who desire to travel from the local bargaining unit to other different units to engage in bargaining in such units. See *The Procter & Gamble Mfg. Co.*, Case No. 29-CA-5366, et al., decided by Judge Ness on 8/31/79.

[6] The Board had previously held that there was no *per se* statutory obligation to bargain during nonworking hours (*Tennessee Chair Co.*, 126 NLRB 1357 (1960)), and no *per se* statutory obligation to release employees from work to engage in bargaining, even within their own bargaining unit (*Borg Warner Controls*, 198 NLRB 726 (1972)).

nights and on weekends. It was demonstrated factually and never rebutted in the microcosm of this case that:

> "regularly scheduled night and weekend negotiations not only by the members of its executive/managerial team involved therein, but also by its 5 employee negotiator "travelers," considering their regular full daytime assignments, would be deleterious to their performance and morale and to the efficiency of Respondent's operations." (App., p. 38a).

It is not difficult to translate this finding into the realities of industrial experience generally. The negotiation of collective bargaining agreements—particularly in the larger segments of the economy—is too important and too time-consuming to be relegated to an after-hours hobby. It is little short of an insult to American labor and industry for the Board to suggest that their core business of collective bargaining under the Act take place after hours. In short, the Board's "alternative" has little practical or popular appeal in the world of industrial reality.

The fact, however, that the Board imposes any choice, Hobson's or otherwise, is itself contrary to the explicit proviso of Section 8(d) of the Act mandating that neither party need agree nor concede to a specific mandatory term or condition of employment.

II

The Decision Below Raises An Important Issue Of Statutory Construction Concerning The Unit Scope Of The Requirement To Bargain In Good Faith

Section 8(a)(5) of the Act is made expressly "subject to the provisions of Section 9(a)." Section 9(a) defines the unit subject to the good faith bargaining requirement of Section 8(a)(5) as the unit found to be "appropriate for such purposes."

Both this Court and the Board have previously acknowledged this statutory limitation on the scope of the bargaining obligation. See, e.g., *United Mine Workers of America v. Pennington*, 381 U.S. 657, 666 (1965), where this Court defined the bargaining obligation as "the duty to bargain unit by unit," *Utility Workers, Local 111 (Ohio Power Co.)*, 203 NLRB 230 (1973), enf'd, 490 F.2d 1383 (6th Cir. 1974). In the *Utility Workers* case, the Board held that:

> "The duty imposed on employers and labor organizations by the provisions of the National Labor Relations Act to bargain collectively is predicated on the cardinal principle that the existing unit, whether established by certification or voluntary recognition, fixes the periphery of the bargaining obligation." 230 NLRB at 238.

It is undisputed that the present case involves four separate units that have been found appropriate for bargaining. Yet the Board finds a bargaining duty violation by the refusal of the employer in one unit to release employees from work to bargain in different appropriate units.

The Board decision thus significantly expands the "periphery" of the employer's bargaining obligation beyond the unit appropriate for bargaining to expressly impose bargaining duties on an employer in one unit concerning bargaining activity in a wholly separate bargaining unit. In short, had the Union been successful in 1971 in its petition to legally consolidate and merge the four separate units into a single unit for purposes of bargaining, the Board's arguments would have more force. By its finding, to the contrary, that four individual bargaining units were appropriate for collective bargaining, the Board should not now be permitted to impose bargaining obligations that extend and cross over bargaining unit boundaries.

The practical significance and importance of the Board's attempted expansion of the scope of the bargaining obligation

beyond the "periphery" of the unit found to be appropriate for collective bargaining is that its logical extension knows no bounds.

In this case itself, there were five employees on the traveling committee who attended bargaining sessions on 18 different days, meaning that some 90 man-days were involved in time off for "traveling" committee members. Suppose instead of insisting on a five-man traveling negotiating committee, the Union insisted on a 10-man committee, and suppose instead of 18 sessions there had to be 36, resulting in a loss of 360 man-days. Under the Board's approach, unless the Company were willing to negotiate all these sessions in the evening and weekends, refusal to automatically accept a loss of 360 man-days would be a *per se* violation of the Act. Suppose in addition, the travelers insisted on assisting in negotiating a contract for other companies also represented by Local 1392,[7] or that they insisted on being permitted time off from work to attend negotiations at units of sister companies in the AEP system—Ohio Power Company, Appalachian Power Company, Kentucky Power Company, etc., or other public utility companies, or even companies having no relationship to the public utility industry.

This open-ended expansion of the bargaining obligation can thus significantly alter the relationships between the parties and needlessly widen the arena of potential conflict between labor and management.

The majority decision failed to come to grips with this important issue because of its misapprehension that the issue in the case was whether an employer could refuse to bargain with a union bargaining committee that contained employee negotiators from different bargaining units. The majority opinion thus relies heavily on *General Electric Co. v. NLRB*, 412 F.2d 512 (2d Cir. 1969), and *Minnesota Mining & Mfg.*

[7] Local 1392 represented two other employers having no connection at all with this Company.

Co. v. NLRB, 415 F.2d 174 (8th Cir. 1969), which do, indeed, support that proposition.

But those cases and their progeny did not address the issue posed by the present case. In those cases, there was no issue raised or litigated about the process by which the employee negotiators from other units were released from their work in those units to attend the "coordinated" negotiations. And yet that is precisely the issue that is raised in this case.

The dissenting opinion of Circuit Judge Wood grasped this shifting of the real issue perfectly:

> "This is not a case of an employer merely refusing to bargain with a committee containing 'outsiders' as in *General Electric Co. v. NLRB,* 412 F.2d 512 (2d Cir. 1969), cited by the majority. That and similar cases stand only for the general proposition that either party may freely choose its own bargaining representatives, including members from a different union. The issue, however, [in *General Electric*] was not whether or not an employer should be required against its will and in the absence of a contractual agreement to permit employees uncontrolled time off for bargaining elsewhere in another separate unit. I find no statutory basis or precedential support for the majority view." (App. p. 12a)

As the Administrative Law Judge noted, there is indeed a conflict between the right of a union to select its own representatives for bargaining, and the right of an employer to carry on its business efficiently without "burdensome" requirements that employees be released to bargain in units other than the unit in which they are employed. The resolution of this conflict, however, does not rest in the Board's expanding the statutory duty to bargain, without benefit of Congressional enactment, to decree yet another "master-rule" to blanket American industry. As stated in the foregoing section on the Reasons for Granting the Writ, this conflict, like other seemingly intractable conflicts

in labor relations should be remanded to the process of free collective bargaining so that individual accommodations can be reached, befitting the individual circumstances in the myriad of industrial environments in which industry and labor co-exist in this country.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT.

No. 77-1685.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INDIANA AND MICHIGAN ELECTRIC COMPANY,
Respondent.

Argued Jan. 5, 1979.

Decided May 21, 1979.

Rehearing En Banc Denied July 11, 1979.

Before TONE and WOOD, Circuit Judges, and EAST,* District Judge.

EAST, District Judge.

The petitioner National Labor Relations Board (the Board) seeks enforcement of its order issued against the respondent Indiana and Michigan Electric Company (the Company) on May 11, 1977 and reported at 229 NLRB No. 95. The Board reaffirmed its order in a supplemental decision and order issued on April 24, 1978 and reported at 235 NLRB No. 159. We note jurisdiction of the proceeding under § 10(e) of the National Labor Relations Act (the Act), as amended 29 U.S.C. § 151, *et seq.*, and enforce the order.

BACKGROUND FACTS:

The Company is an incorporated Indiana public utility which generates and sells electricity in Indiana and Michigan.

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* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

The Company and Local 1392, International Brotherhood of Electrical Workers, AFL—CIO (the Union) are presently parties to four collective bargaining agreements. These agreements separately cover Company employees in the following four bargaining units in Indiana and Michigan: (1) South Bend, Benton Harbor and Twin Branch Generating Divisions; (2) Marion and Muncie Divisions; (3) Fort Wayne Division; and (4) General Office Transmission Construction and Maintenance Group. The Fort Wayne Division unit was established in 1934 through the Company's voluntary recognition, while the other three units were established between 1952 and 1971 through Board certification.

In early 1971, the Union's predecessor locals filed with the Board's 25th Regional Office (the Regional Office), over Company opposition, unit clarification and amendment of certification petitions requesting establishment of a single company-wide bargaining unit. The Regional Office dismissed these petitions. In September, 1971, the predecessor locals merged into the Union. The Company agreed to recognize the Union so long as the separate identities of the four bargaining units were maintained.

In 1972, and again in early 1975, the Company filed with the Regional Office unfair labor practice charges alleging, in effect, that the Union was attempting to engage in a company-wide bargaining in derogation of the established four units. In both cases, the Regional Office determined that the evidence did not support the charges and refused to issue unfair labor practice complaints. In the 1972 case, the Board's General Counsel upheld on appeal the Regional Office decision.

In the 1975-76 collective bargaining cycle, the four then existing contracts expired on different dates between October 31 and December 31, 1975.[1] The parties set separate schedules of contract renewal negotiations for each of the four units.

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[1] Hereafter, except as otherwise noted, date references are to the period September, 1975 to March, 1976.

The initial bargaining session was held on September 23 for the South Bend, Benton Harbor and Twin Branch Generating Divisions unit, whose existing contract expired first. At that meeting, the Union suggested, as it had in the past, that negotiations be combined for all four units. The Union repeated this suggestion at the next negotiating session on October 1 for the Marion and Muncie Divisions unit. On each occasion, the Company rejected the Union's suggestion. At the September 23rd meeting, the Union made neither "local" demands relating to the South Bend, Benton Harbor and Twin Branch Generating Divisions unit nor economic demands. In later bargaining sessions, the Union's demands in the four units were very similar.

During the September and October negotiations, the Union was represented by a single bargaining committee consisting of nine to eleven members. The committee consisted of Chester M. Herriman, the Union's Business Manager; a union international representative; employee members of the specific unit to which the bargaining in question directly pertained; and employee members drawn from other units. The employee representatives in the last category were called "travelers," a designation referring to the necessity of their traveling from their own units in order to attend negotiations in other units.[2] At a union meeting prior to the September bargaining session, employees elected some of the travelers, and the union leadership appointed the others. Travelers participated without Company protest in the first four bargaining sessions—September 23, October 1, October 8, and October 9.

Immediately after the meeting on October 9, 1975, in South Bend, Mr. Willmore, the Company's Labor Supervisor,

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[2] In prior years, the Union had made some use of travelers in collective negotiations; and in the 1973 and 1974 negotiations, the Company excused from work, but did not pay, travelers or non-travelers while they attended or traveled to and from bargaining sessions.

and Mr. Herriman agreed on a schedule for further meetings in all four units. The schedule tentatively agreed upon called for the following meetings in the following units:

1. South Bend, Benton Harbor, Twin Branch unit—October 29 and 30.
2. Marion-Muncie unit—November 10 and 18.
3. General Office unit—November 26, December 11, 12 and 18.
4. Fort Wayne unit—December 2, 3, and 10.

Up to this point in the negotiations, Willmore had not been concerned about the presence of travelers in the negotiations because of past experience with respect to such travelers in the 1973 and 1974 negotiations. In those negotiations, the custom was that the travelers would attend one or two of the initial meetings and then attend no further meetings. In 1973, at the initial Marion-Muncie meeting, for example, there were in attendance one employee from South Bend, one employee from Benton Harbor, one employee from Twin Branch and one employee from Fort Wayne. However, the maximum number of days off requested by employees in the 1973 and 1974 negotiations to attend meetings in units outside of their own unit was two days. The negotiations in 1973 and in 1974 each spanned 12 meetings for the bargaining units involved.

Lyle Van Aman, an employee traveler, who was at the October 9th meeting where the tentative schedule was agreed upon, requested to be off work on the 11 days in question. His request was transmitted through the personnel supervisor in the Fort Wayne Division to Willmore. Upon receipt of the request for 11 days off, the Company re-examined its policy of allowing time off to travelers.

Around October 21, the Company denied Van Aman and the other employee travelers permission to take leave without pay in order to attend negotiations in units other than their own. The Company justified this action on the alleged ground

that such leave, particularly in the case of Van Aman, would be burdensome to administer and that the Union's use of travelers was an attempt to effect company-wide bargaining. The next bargaining session, the fifth, on October 29, was aborted when the Company adhered to its position regarding travelers and the Union refused to proceed with negotiations until the Company permitted the participation of travelers.

On October 30, the Union filed the unfair labor practice charge in this case, complaining, in part, of the Company's refusal to allow travelers to engage in negotiations. At about this same time, Union International Representative Everett J. Bailey asked Willmore for a negotiating meeting on the following Saturday, which was not a regular working day, or on any Saturday, Sunday, or evening when Van Aman, as well as the other Union bargaining committee members, would be able to attend. On November 10, Herriman wrote Willmore, also requesting negotiations outside normal working hours in order to permit the attendance of the Union bargaining committee. On November 21, Willmore responded by a letter rejecting this alternative proposal on the ground that "it [would be] unreasonable, under the present circumstances, to ask members of the various Company committees to devote their nights or weekends to negotiation."

On December 31, the Regional Office issued the unfair labor practice complaint on the Union's October 30th charge. The Regional Office refused, however, to issue a complaint on a charge filed by the Company alleging that the Union's use of travelers was an attempt to effect company-wide bargaining. On February 18, the General Counsel, on appeal, affirmed the refusal to issue the complaint on the Company's charge.[3]

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[3] On January 7, the Company agreed, without prejudice to its position in this case, to excuse travelers from work in order to permit resumption of negotiations. Thereafter in March, following a February strike by the Union, the parties concluded four separate contracts, one for each of the four units.

On June 24, 1976, the Administrative Law Judge (ALJ) dismissed the complaint of December 31 and found that the release of employees to travel to other bargaining units was "burdensome" for the Company to administer, and that bargaining at night and on weekends, for both the management and Union committees who had normal work assignments during the working day, "would be deleterious to their performance and morale and to the efficiency of Respondent's operations."

On May 11, 1977, the Board reversed the ALJ and concluded that the Company violated § 8(a)(5) and (1) of the Act by refusing to grant travelers uncompensated leave to permit them to engage in bargaining during working hours, while simultaneously refusing the Union's request to bargain during nonworking hours since its conduct interfered with the Union's right to select its own bargaining representatives.

BOARD'S PERTINENT FINDINGS:

The Board found that the Company had failed to make an evidentiary showing sufficient to overcome the employees' right to select their own bargaining representatives.

The Board's order requires the Company to cease and desist from the violation found, from "[i]n any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed by Section 7 of the Act." Affirmatively, the Board's order requires the Company, upon request, to meet and bargain with the Union pursuant to the Act; if understandings are reached, to embody them in written signed agreements; and to post the Board's remedial notices. The Board further noted that in view of the currently effective bargaining agreements between the parties, its order did not require the Company to bargain with the Union concerning the alteration of any terms prior to the date for reopening or renegotiating the agreements.

On October 7, 1977, the Board notified the parties that it had decided, sua sponte, to reconsider its decision. Because the

ALJ had found for the Company on other grounds, he had not reached the Company's affirmative defense that the Union's use of travelers was an unlawful attempt to compel company-wide bargaining. In originally reversing the ALJ, the Board had not addressed that affirmative defense. In its supplemental decision, the Board found that the record evidence upon which the Company relied failed to establish that the Union was actually insisting on bargaining in a single unit, because there was no evidence that the Union threatened to reject all of the Company's bargaining offers in the four units unless common offers were received, or that it withheld ratification, or otherwise threatened economic pressure to force commonality of Company offers. The Board, therefore, rejected the Company's affirmative defense and reaffirmed its initial decision and order.

ISSUES ON REVIEW:

The conclusive issues on review are:

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Company's refusal to allow certain employee members of the Union's collective bargaining committee to participate in negotiating sessions outside their own bargaining units violated § 8(a)(5) and (1) of the Act by interfering with the Union's right to select its own bargaining representatives; and

2. Whether the Union's conduct from 1971 through the 1975-76 negotiations evidences a scheme to force multi-unit bargaining on the Company in violation of §8(b)(3) the Act, thereby precluding the existence of a situation in which the Company's good faith can be tested.

The Company's issue questioning the ALJ's order for 1971-76 Union records as improper is without merit.

DISCUSSION:

We recognize that the Act's guarantee of free choice encompasses the right of employees to select, absent extraordinary circumstances, whomever they wish to represent them in

collective negotiations with employers. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33, 57 S.Ct. 615, 81 L.Ed. 893 (1937); *Schmerler Ford, Inc. v. NLRB*, 424 F.2d 1335, 1339 (7th Cir.), *cert. denied*, 400 U.S. 823, 91 S.Ct. 45, 27 L.Ed.2d 52 (1970). An employer has the burden of showing the existence of such extraordinary circumstances. Otherwise the employer violates the Act by interfering with its employees' choice of negotiators, or by refusing to deal with the negotiators once selected. *Minnesota Mining and Manufacturing Co. v. NLRB*, 415 F.2d 174, 177-78 (8th Cir. 1969); *General Electric Co. v. NLRB*, 412 F.2d 512, 516-17 (2d Cir. 1969); *NLRB v. David Buttrick Co.*, 339 F.2d 505, 507 (1st Cir. 1968); and *Standard Oil Co. v. NLRB*, 322 F.2d 40, 44 (6th Cir. 1963).

General Electric Co., 412 F.2d at 517, teaches:

> "There have been exceptions to the general rule that either side can choose its bargaining representatives freely, but they have been rare and confined to situations so infected with ill-will, usually personal, or conflict of interest as to make good-faith bargaining impractical. . . . Thus, the freedom to select representatives is not absolute, but that does not detract from its significance. Rather the narrowness and infrequency of approved exceptions to the general rule emphasizes its importance. Thus, in arguing that employees may not select members of other unions as 'representatives of their own choosing' on a negotiating committee, the Company clearly undertakes a considerable burden, characterized in an analogous situation in *NLRB v. David Buttrick Co.*, 399 F.2d 505, 507 (1st Cir. 1968), as the showing of a 'clear and present' danger to the collective bargaining process."

It follows that the union members' reason for the choice of a given representative is subject to limited scrutiny. This premise is based upon the principle of affording broad protection for employees' free choice of their bargaining representa-

tives and applies equally where, as in the present case, a union engages in what has been termed "coordinated bargaining."[4] Absent extraordinary circumstances, an employer may not refuse to bargain on the basis of objections to a bargaining representative's use of coordinated bargaining. *Minnesota Mining and Manufacturing Co.; General Electric Co.; Standard Oil Co.; Indianapolis Newspapers, Inc.*, 224 NLRB 1490, 1499-1500 (1976); and *Harley Davidson Motor Co.*, 214 NLRB 433, 437-38 (1974).

We reiterate that the Company has recognized four separate bargaining units within its operations. The Union's selected bargaining committee for a given unit contains one or more members of a separate unit or units (travelers). The Union asserts the reason for selecting Van Aman as a member of the questioned bargaining committee was to foster communication among the Units. *Au contraire,* asserts the Company. It claims that the Union selected Van Aman as a tactic to illegally force company-wide bargaining. This argument is based on the principle that because the periphery of an employer's bargaining obligation is fixed by the limits of each particular existing unit, a union may not use the device of coordinated bargaining to force company-wide negotiations upon an employer in derogation of established separate bargaining units. *Utility Workers Local 111,* 203 NLRB 230, 238 (1973); *enforced per curiam,* 490 F.2d 1383 (6th Cir. 1974).

Such a premise of the Company is easily stated but not so easily applied to a given factual situation. The tidal force of the employees' right to freely choose their representatives creates the riptide from the force of the right of the Company to be protected from a "clear and present" danger to a good faith collective bargaining process as well as from a forced company-wide bargaining situation. We believe that the Board could

[4] Coordinated bargaining is a negotiating technique whereby a union coordinates its bargaining with other unions or other bargaining units by including on its negotiating panel members of such other unions or bargaining units.

properly find that the Company's refusal to grant Van Aman the requested time off to attend the 11 scheduled meetings, or, alternatively, to schedule weekend meetings, effectively denied the employees representation by Van Aman. It could also reasonably conclude that any economic hardship or managerial disruption suffered by the Company is manifestly less than that recognized by the Company from sick leave and vacation time for employees arrived at through collective bargaining.

As for the Company's claim of a union forced company-wide bargaining situation, we recite that an employer may not lawfully refuse to bargain with a union negotiating committee or committees simply because the union is coordinating the various bargaining efforts and the employer suspects or anticipates that the union may ultimately use this coordination to force it into company-wide negotiations. Rather, to justify a refusal to bargain on that score, an employer must demonstrate that the coordinated bargaining in question is done in bad faith with the purpose of forcing a company-wide bargaining situation—that is, that the union is actually abusing the device and not simply that the union might do so in the future. *General Electric Co.*, 412 F.2d at 517. *Accord, Minnesota Mining and Manufacturing Co.*, 415 F.2d at 178.

We are impressed with the colorful language of the Board's trial examiner in *Minnesota Mining and Manufacturing Co.* as restated in 415 F.2d at 175:

> " 'The Company perhaps should not be blamed for trying to keep the union camel from sticking its nose under the tent. But whatever may be the Company's fears, and howsoever accurate its prognostication and its discernment of the Union's ultimate aims, the Company here and now is under a duty to bargain with the Union and this encompasses a duty to bargain with whatever representatives the Union chooses to send. The mere possibility of future abuse (which indeed the Union disclaims), is no justification for an anticipatory refusal to bargain.' "

We have perused the evidentiary record and find that when considered as a whole, the Board's pertinent and material findings of fact are supported by substantial evidence, and we conclude that the Board's conclusions based upon the particular facts of this cause are supported by law. The issues in the cause heavily involve:

> "the conflicting interests of labor and management, and as such 'the Board's determination is to be subjected to "limited judicial review" ', *Brown, supra,* 380 U.S. [278] at 290, 85 S. Ct. [980] at 987 [13-L. Ed.2d 839]. Indeed, the Board is in a far better position than is this court to determine whether certain actions do or do not actually pose a danger to the collective bargaining process. *See National Labor Relations Board v. J. Weingarten, Inc.,* 420 U.S. 251, 266-67, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975); *General Electric, supra,* 412 F.2d at 520." *Intern. Broth. of Elec. Wkrs., AFL-CIO v. NLRB,* 557 F.2d 995, 998 (2d Cir. 1977).

The Board's petition for enforcement of its orders is granted.

ENFORCED.

HARLINGTON WOOD, Jr., Circuit Judge, *dissenting.*

I respectfully dissent. I concur with Board Member Walter's dissent to the Board's Decision and Order in which he supports the views of the Administrative Law Judge.

The substantial record evidence as found by the Administrative Law Judge refutes, not supports, the Board's decision. The ALJ found that the company's action, was not unlawfully motivated or otherwise improper under the Act, but was nondiscriminatory and occasioned by perceived bona fide operational needs. When company employee Van Aman a key "trouble-shooter" on call around the clock for emergencies,

requested 11 days off to attend the meetings, the company was compelled to reexamine its policy. The company represents that there were five employees on the traveling committee who attended bargaining sessions on 18 different days resulting in about 90 man-days lost to the company. This, I view, as unwarranted and unauthorized business disruption. The company had no objection to time off for employees to bargain for their own unit.

There was no collective bargaining agreement negotiated between the union and the company permitting employees to take time off to bargain outside their units at other locations. With this case as precedent there will no longer be any need for a union to bargain on that issue. The company has lost any right to bargain for some reasonable control or limitation on the practice. The union has gained a new bargaining tactic subject to obvious abuse. No limitation is placed on the number of employees nor the amount of time off that the union can now impose on an employer against its business judgment.

This is not a case of an employer merely refusing to bargain with a committee containing "outsiders" as in *General Electric Co. v. NLRB*, 412 F.2d 512 (2d Cir. 1969), cited by the majority. That and similar cases stand only for the general proposition that either party may freely choose its own bargaining representatives, including members from a different union. The issue, however, was not whether or not an employer should be required against its will and in the absence of a contractual agreement to permit employee uncontrolled time off for bargaining elsewhere in another separate unit. I find no statutory basis of precedential support for the majority view.

To give the company a way out of the imposed burden by bargaining at the end of the work day or on weekends or holidays is not a reasonable fair choice. Both management and employees should be entitled to some time off from their regular labors for rest and relaxation. Tired employees after late bargaining sessions could not be expected to be up to their

normal efficiency on the subsequent work day. The union has not suggested that employees devote their vacation time to "travelling" for union bargaining purposes.

Another consideration in this case is that the union since 1971 has been consistently endeavoring one way or the other to cause the four separate bargaining units to be consolidated into one. In 1971 the Regional Director denied the union petitions seeking consolidation. Even at the beginning of these particular negotiations the union was requesting joint bargaining for all four units. To use the terminology quoted by the majority, the union camel has been constantly circling the company tent probing for a way to stick its nose under. Now the Board itself had indirectly lifted the edge of the tent to make it easy.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

July 11, 1979

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. WILLIAM G. EAST, Senior District Judge*

No. 77-1685

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INDIANA AND MICHIGAN ELECTRIC COMPANY,
Respondent.

Petition for Enforccement of an
Order of the National Labor
Relations Board.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by

* The Honorable William G. East, Senior United States District Judge for the District of Oregon, sat by designation at oral argument. Judge East did not participate in the vote on the petition for rehearing *in banc.*

counsel for the respondent, a vote of the active members of the court was requested, and a majority** of the members of the court have voted to deny a rehearing *en banc*. A majority of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

** Judges Pell, Bauer, and Wood voted to grant rehearing *in banc*.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

INDIANA AND MICHIGAN ELECTRIC COMPANY

and **Case 25-CA-7476**

LOCAL UNION 1392, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

SUPPLEMENTAL DECISION AND ORDER

On May 11, 1977, the National Labor Relations Board issued its Decision and Order[1] in the above-captioned proceeding wherein it reversed the finding of the Administrative Law Judge and concluded that Respondent violated Section 8(a)(5) of the National Labor Relations Act by "refusing to hold individual negotiation sessions outside normal business hours while simultaneously refusing . . . employee travellers' requests for leave without pay to attend negotiation sessions outside their own units."[2] Thereafter, on October 7, 1977, the Board notified the parties that it had decided, *sua sponte,* to reconsider its decision. The Board indicated it would do so on the basis of the record and the briefs already submitted.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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[1] 229 NLRB No. 95 (Members Jenkins and Murphy; Member Walther dissenting).

[2] *Id.* sl. op., p. 5.

The Board has reconsidered the record, the Administrative Law Judge's Decision, and its original decision in light of the exceptions and briefs and has decided to reaffirm its prior decision in this proceeding.[3]

The Administrative Law Judge found that Respondent's refusal to engage in negotiation sessions outside normal business hours and its simultaneous refusal to allow employee travellers leave without pay to attend negotiation sessions outside their own bargaining units was premised on valid economic considerations and therefore did not constitute a violation of Section 8(a)(5) of the Act. As noted, *supra,* a majority of the original Board panel disagreed with that conclusion. In so finding, however, the Board panel did not address itself to an affirmative defense raised by Respondent that the Union by raising the employee traveller issue was attempting to coerce Respondent into bargaining with the Union in a single bargaining unit in derogation of the parties' four established bargaining units. It is to this defense of Respondent that we now turn.

The Union represents various of Respondent's employees in four separate bargaining units located at three locations in Indiana and Michigan. Each of these units' contracts was due to expire at various dates in late 1975 and, accordingly, in the fall of 1975 the parties began negotiations on a new contract for each unit. During the 1975 negotiations, the Union's bargaining committee was comprised of union representatives, unit employee representatives, and employee representatives who were employed in one unit and attended negotiation sessions for other units. Employees in the last category were called travellers. While Respondent initially allowed the travellers time off without pay to attend bargaining sessions in units other than their own, it ultimately refused such permission. In

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[3] While Chairman Fanning was not on the original panel in this proceeding, he agrees with that panel's earlier decision that Respondent violated Sec. 8(a)(5) of the Act and he joins with his colleagues in reiterating that conclusion herein.

response to an alternative proposal by the Union, Respondent also refused to engage in bargaining sessions which the travellers could attend but which would commence outside normal business hours. These refusals resulted in the instant proceeding.

In reversing the Administrative Law Judge, the panel majority concluded in the prior decision that, while Respondent was under no obligation to acquiesce to the Union's demands for bargaining sessions outside normal business hours, it could not simultaneously refuse its employees' requests for leave without pay to attend contract talks because these employees were not employees of the unit involved. Thus, if Respondent refused a request for unpaid time off it then was incumbent upon Respondent to engage in negotiation sessions when employee representatives could attend, even, if necessary, outside working hours. The panel majority determined that, by refusing either alternative, Respondent interfered with the Union's right to select its own bargaining representative in violation of Section 8(a)(5) of the Act.

Respondent has contended, however, that the Union's demands regarding employee travellers were pretexts for stalling negotiations until after the date of the last expiring contract as part of an overall scheme to force bargaining onto a single companywide unit. It contended that the Union had engaged in a similar course of conduct during the 1971 negotiations as evidenced by Union Representative Herriman's admission during the hearing that in 1971 part of the Union's strategy was to allow all four unit contracts, each with a different expiration date, to expire before any accord would be reached. As further evidence of the Union's intent, Respondent noted, *inter alia*, the following factors: (1) the Union's unsuccessful attempt to merge the four units via AC and UC petitions in 1971; (2) an internal merger in 1971 of the four predecessor locals into the Union; (3) the initial appearance of travellers on the union committee in 1971 and their increase in numbers in the 1975 negotiations; (4) the fact that the Union initially asked that

negotiations be combined for all four units in the early 1975 negotiations; and (5) the Union's 1975 contract proposals in all four units being virtually identical and for the first time failing to include "local" demands.[4]

Viewing the entire record, we find, contrary to Respondent's contention, that there is insufficient evidence to support its affirmative defense that the Union's attempted use of employee travellers during the 1975 negotiations was a part of an overall scheme to compel a *de facto* merger of the four established units and to force Respondent into bargaining on an overall single unit basis. The factors Respondent has cited, taken singly or in conjunction, fail to substantiate its claim that the Union had an unvielding negotiation strategy in 1975 as contended. Indeed, the facts fail to show that the Union was actually insisting on bargaining for all units together as a condition precedent to bargaining in good faith. The presence of travellers was not inherently incompatible with four-unit bargaining. Thus, pursuit of the traveller issue by the Union did not itself evince bad faith, that is, a firm ulterior motive to bargain only for the broad unit. The burden was Respondent's to demonstrate that acceding to one of the Union's alternate positions on the traveller issue necessarily would have forced bargaining beyond the scope of the recognized bargaining units and Respondent has not met that burden here.[5] Accordingly, Respondent's defense is without merit and we reaffirm our prior decision that Respondent has violated Section 8(a)(5) of the Act here.

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[4] We note that, while the Administrative Law Judge commented that Herriman had "conceded" that since 1971 an objective of the Union was to bargain with Respondent as a single unit, Herriman's overall testimony on this point was contradictory.

[5] The Administrative Law Judge quashed Respondent's subpenas for union records purporting to show that the Union's conduct in 1975 was a continuation of the 1971 strategy of seeking bargaining in one unit. The Administrative Law Judge concluded the subpenas were overbroad. We agree. Respondent's defense has been otherwise fully articulated and we find no merit in it.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby reaffirms its Order as contained in its original Decision and Order, issued May 11, 1977 (229 NLRB No. 95), in this proceeding.

Dated, Washington, D.C. April 24, 1978

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JOHN H. FANNING, *Chairman*

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HOWARD JENKINS, JR., *Member*

.....

BETTY SOUTHARD MURPHY, *Member*

(SEAL) NATIONAL LABOR RELATIONS BOARD

BEFORE NATIONAL LABOR RELATIONS BOARD

Indiana and Michigan Electric Company *and* Local Union 1392, International Brotherhood of Electrical Workers, AFL-CIO. Case 25-CA-7476

May 11, 1977

DECISION AND ORDER

BY MEMBERS JENKINS, MURPHY, AND WALTHER

On June 24, 1976, Administrative Law Judge Stanley N. Ohlbaum issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief to the General Counsel's exceptions. The General Counsel subsequently filed a motion to reopen the record and remand this proceeding to the Administrative Law Judge for the purpose of consolidating this proceeding with that in Case 25-CA-8593, where similar conduct by the Respondent is alleged as an unfair labor practice by the Charging Party here. The Respondent then filed an opposition to the General Counsel's motion,[1] and the General Counsel filed a response to the opposition.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge concluded that the Respondent did not violate Section 8(a)(5) of the Act by refusing

[1] After due consideration of the General Counsel's motion, the Respondent's brief in opposition thereto, and General Counsel's response to the Respondent's opposition, the General Counsel's motion is hereby denied.

to allow certain employee "travelers" to attend negotiation sessions outside their own bargaining units.[2] Rather, the Administrative Law Judge found that the rationale set forth by the Respondent for its decision consisted of valid economic and business reasons and amply justified both its refusal to commence bargaining sessions outside normal business hours and its refusal to approve travelers' requests for leave without pay to attend such sessions. We disagree.

The General Counsel alleged that the Respondent violated Section 8(a)(5) and (1) of the Act by (1) refusing to meet with the union representatives outside working hours, and by (2) *simultaneously* refusing to allow members of the bargaining committee leave without pay to travel to and participate in negotiations with respect to units in which they are not employed. The Respondent defended its actions principally on the theory that at least one "traveler" and member of the committee, VanAman, was a troubleshooter whose presence could not be spared for the aggregate of 11 days requested to participate in these negotiations. The alleged violation was not pinned to one or the other of the Respondent's actions, but resulted from the application of both actions together, which effectively deprived the Union of the assistance of the bargaining representatives it desired. We find that the Respondent's refusal to grant members of the Union's negotiations committee uncompensated leave to permit them to engage in bargaining during working hours, while at the same time refusing the Union's request to bargain during nonworking hours, is an unlawful interference with the Union's selection of its bargaining representatives.

We do not suggest that an employer is compelled to yield to a union's request for negotiations outside normal business

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[2] The Respondent and the Charging Party are signatories to four collective-bargaining agreements covering employees in four separate units located in three general locations in the States of Indiana and Michigan. Employee "travelers" are employee representatives from one unit who are members of the union bargaining committee at other units.

hours. It is free to insist on bargaining during the working day, if it prefers, as the Respondent did here. If it makes this choice, however, it cannot at the same time refuse to allow unpaid time off to union representatives on the bargaining committee because they are employed in another unit. Alternatively, the Employer is free to acquiesce in the Union's request to bargain during nonworking hours in order to reduce the amount of uncompensated leave for travelers and to minimize the effects of the unavailability during their regular working hours of emergency troubleshooters.

However, the Respondent cannot have it both ways. That is, if, as here, the Respondent makes the choice to bargain during the working day, it cannot lawfully refuse to allow union employee representatives time off. But, if it does refuse to give such employees time off, then it is obligated to make itself available for negotiations at a time—even outside working hours—when the representatives can attend. It is the Respondent's attempt here to have it both ways that constitutes the violation of the Act.

In sum then, we find, contrary to the Administrative Law Judge, that by refusing to hold bargaining sessions at a time when the travelers who were designated employee representatives could attend them the Respondent violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Indiana and Michigan Electric Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local union 1392, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times relevant herein, Local Union 1392, International Brotherhood of Electrical Workers, AFL-CIO, has

been the exclusive representative of all employees in the four appropriate units set forth below for purposes of collective bargaining with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment within the meaning of Section 9(a) of the Act:

(i) All probationary and regular production and maintenance employees of the Respondent under the supervision of the South Bend and Benton Harbor Divisions, having their headquarters within the Respondent's Elkhart, South Bend, Buchanan, or Benton Harbor areas, and all probationary and regular production and maintenance employees of the Respondent under the supervision of the Twin Branch Generating Division having their headquarters at the Twin Branch Plant or South Bend, exclusive of all administrative employees, part-time employees, temporary employees, office clerical employees, plant clerical employees, technical employees, confidential employees, guards, professional employees, supervisors as defined in the Act, and all other employees.

(ii) All production and maintenance employees in the General Office Transmission Construction and Maintenance Group of the Respondent, including construction employees, Lineman A, B, and C, Linemen-Helpers, and Driver-Groundmen, exclusive of office clerical employees, professional employees, guards, supervisors as defined in the Act and all other employees.

(iii) All regular production, maintenance, and distribution employees of the Respondent employed within its Marion and Muncie Divisions, including meter readers, exclusive of all guards, office clerical employees, technical employees, professional employees, part-time employees, temporary employees, probationary employees, and supervisors as defined in the Act.

(iv) All employees of the Respondent's Fort Wayne Division covered by the collective bargaining agreement between the Respondent and the Union which bears the effective dates of December 16, 1973, to December 15, 1975.

4. By refusing to hold individual negotiation sessions outside normal business hours while simultaneously refusing since on or about November 21, 1975, employee travelers' request for leave without pay to attend negotiation sessions outside their own units. Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. By engaging in the above-described unfair labor practices, Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed them by Section 7 of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act by refusing to commence bargaining sessions outside normal business hours while simultaneously refusing employee travelers' request for leave without pay to attend negotiation sessions outside their individual units, we will order that the Respondent cease and desist from engaging in such unfair labor practices and, upon request, bargain collectively with Local Union 1392, International Brotherhood of Electrical Workers, AFL-CIO, and its designated agents at times and places mutually convenient concerning wages, rates of pay, hours, and other terms and conditions of employment, as indicated in our Order below.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Indiana and Michigan Electric Company, Fort Wayne, Indiana, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to commence individual negotiation sessions with Local Union 1392, International Brotherhood of Electrical Workers, AFL-CIO, and its designated agents, outside normal business hours, while simultaneously refusing employee travelers' requests for leave without pay in order to attend bargaining sessions outside their own units.

(b) In any like or related manner interfering with the efforts of the above-named labor organization to bargain collectively on behalf of the employees so represented.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, meet and bargain with the above-named labor organization and its designated agents as exclusive representatives of all its employees in the appropriate units described above at times and places mutually convenient to all parties with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody it in a written signed agreement.[3]

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[3] In view of the currently effective collective-bargaining agreement between Respondent and the Charging Party, nothing in this Order should be construed to require Respondent to bargain with the Charging Party concerning the alteration of any terms of such agreement prior to the date established therein for the reopening or renegotiation of same.

(b) Post at its places of business in South Bend, Benton Harbor, Twin Branch, Marion, Muncie, and Fort Wayne located in the States of Indiana and Michigan, copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

MEMBER WALTHER, *dissenting:*

For all the reasons set forth in the Administrative Law Judge's Decision, I would adopt his conclusion that the Respondent's refusal to grant "employee travelers" time off to attend negotiation sessions in units other than their own did not violate Section 8(a)(5) and (1) of the Act. The requested time off would have entailed extensive traveling which—as the Administrative Law Judge found with respect to traveler Lyle VanAman—would have interfered with the Respondent's operations. The Respondent's refusal to accede to the Union's demand is thus based upon valid business considerations. Since the Respondent's action was not shown to be other than for "nondiscriminatory perceived bona fide operational needs," the evidence does not support the majority finding. I agree with the Administrative Law Judge that the complaint should be dismissed.

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[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL, upon request, meet and bargain collectively at mutually convenient times and places with Local Union 1392, International Brotherhood of Electrical Workers, AFL-CIO, and its designated agents as your exclusive representative and, if an understanding is reached, embody it in written signed agreement.

WE WILL NOT in any like or related manner interfere with the efforts of the above-named Union to bargain on behalf of the employees in the relevant units by refusing to commence individual negotiation sessions outside normal working hours while simultaneously refusing to approve requests from employee travelers for leave without pay in order to attend negotiation sessions outside their individual units.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

INDIANA AND MICHIGAN
ELECTRIC COMPANY

DECISION

STATEMENT OF THE CASE

STANLEY N. OHLBAUM, Administrative Law Judge: This proceeding under the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.* (herein the Act), based upon complaint issued on December 31, 1975, by the Regional Director for Region 25, growing out of a charge filed on October 30, 1975, by Local Union 1392, International Brotherhood of Electrical Workers, AFL-CIO, was heard by me in Fort Wayne, Indiana, on March 25-26, 1976, with all parties participating throughout by counsel or other representative and afforded full opportunity to present evidence and arguments, as well as to file briefs, which were received by June 1, 1976, after extension of time upon application of counsel. Record and briefs have been carefully considered.

The principal issue presented is whether the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively in good faith with the Charging Party within the Act's requirements.

Upon the entire record and my observation of the testimonial demeanor of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

At all material times, Respondent Indiana and Michigan Electric Company, an Indiana corporation with principal office and place of business at Fort Wayne, Indiana, as well as other facilities elsewhere in Indiana and Michigan, has been and is engaged in production, sale, and transmission of electrical energy as a public utility. In the course and conduct of that business during the representative year immediately preceding issuance of the complaint, Respondent produced, sold, and transmitted electrical energy exceeding $250,000 in gross value; and, during the same period, Respondent received goods, transported directly in interstate commerce to its Indiana facilities from States other than Indiana, valued in excess of $50,000.

I find that at all material times Respondent has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; and that all of those times the Union has been and is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

The underlying material facts are essentially undisputed.

Respondent (a subsidiary of American Electric Power Company), an electricity-generating and distributing public utility in Indiana and Michigan, has, in connection with the

conduct of its business, maintained collective-bargaining relationships with IBEW Local 1392, the Charging Party, or its predecessors,[1] through the four separate units involved in the instant case,[2] heretofore certified by the Board or designated without election and recognized as appropriate:

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[1] In August 1971, the International Union notified Respondent that effective September 1, 1971, its Locals 1821 and 1822 (then at Respondent's Marion and Muncie units) and also Local 2292 (then at Respondent's South Bend, Benton Harbor, and Twin Branch units) would merge into Local 1392 (then at Respondent's Fort Wayne unit; Charging Party in the instant case). On August 20, 1971, Respondent informed the Union that, since the merger was an internal union matter, it raised no objection and would recognize Local 1392 as successor to the existing contractual obligations, so long as the separate identity of the four bargaining units was clearly retained. Earlier in 1971 the predecessor locals of Local 1392 had unsuccessfully sought, over the Respondent's opposition, to amalgamate at least some of the bargaining units here into a single bargaining unit. Following the September 1971 merger of the various locals (which had up to then each been tied and limited to one of the four separate bargaining units) into Local 1392, Respondent on several occasions filed formal charges before the Board that Local 1392 was again endeavoring to merge the four separate (including three separately Board-certified) units into a single unit, or, over Respondent's opposition, endeavoring to engage in improper "coordinated bargaining" designed in effect to merge the separate units, but the Regional Director and General Counsel refused to issue a complaint on any of these charges. As is well known, under the Act the refusal of General Counsel to issue a complaint is not subject to review by either the Board or the courts.

[2] Respondent maintains power plant facilities in addition to those in the coverage of the four collective-bargaining units here.

Respondent also has collective-bargaining relationships with three other unions—United Steelworkers of America, at its South Bend and Benton Harbor facilities; International Association of Machinists and Aerospace Workers at its Breed plant; and Utility Workers of America at its Tanners Creek plant.

Unit Covered	Area or Other Coverage	Basis for Rep. Status	Year
South Bend, Benton Harbor, Twin Branch Generating Divisions ("SB-BH-TB")	Elkhart, South Bend, Buchanan, Benton Harbor	Certification	1969
Marion and Muncie Divisions ("MA-MU")	Marion, Muncie	Certification	1952
Fort Wayne Division ("FW")	Fort Wayne	Designation-Recognition	1934
General Office Transmission Construction and Maintenance Group ("GO")		Certification	1971

The Union now represents an aggregate of some 720 members (together with additional nonmembers) in these four bargaining units, as well as employees of two utilities other than Respondent. The categories of employees included in each of Respondent's four bargaining units appear to vary.[3] Since the foregoing original certifications or recognition without election, Respondent and Union have entered into successive separate collective agreements for each of these four units. The issues presented here arise out of events occurring in connection with the 1975-76 contractual renewal negotiations.

Since each of the latest of these collective agreements, each for a 2-year term, expired at or toward the end of 1975,[4] the following initial dates and places were established by the parties for negotiations:

SB-BH-TB—9-23, 10-8, 10-9, 10-29, 10-30, 10-31, at South Bend.

MA-MU—10-1, 11-10, (11-11), 11-18, at Muncie.

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[3] Or, at any rate, the definitions of the units are in no two cases worded the same.

[4] SB-BH-TB, October 31; MA-MU, November 30; FW, December 15; GO, December 31.

FW—11-17, 12-2, 12-3, 12-10, at Fort Wayne.
GO—11-26, 12-11, 12-12, 12-18, at Fort Wayne.

At the initial bargaining session (September 23 at South Bend for the SB-BH-TB unit), according to Respondent's labor relations supervisor and chief company negotiator, Willmore, a new bargaining pattern was demonstrated by the Union. Unlike previous occasions, this time there was an absence of "local" demands relating to the specific unit, as well as an absence of economic demands; and, later, unit demands in the other units were basically the same. Also at that initial bargaining session (September 23), the Union suggested (as it had in the past) that negotiations be combined for all four units, but the Company declined (as it had in the past), as it did again at the ensuing negotiating session on October 1 at Muncie for the MA-MU unit.

Between October 9 and 21, 1975—after several initial bargaining sessions had been held, Lyle VanAman—a member of the FW unit, employed by Respondent at its Fort Wayne facility on its "troubleshooter" service crew there on duty around-the-clock in varying numbers, with a shift rotating from 8 a.m.-4 p.m. to 4 p.m.-midnight to midnight-8 a.m., and a member of the union bargaining committee for *all four of the units*—submitted to his supervisor at Fort Wayne a request to attend all future bargaining sessions for all four units, as of that date scheduled to be held at the locations above specified, according to his request on October 29 and 30, November 17, 18, and 26, and December 2, 3, 10, 11, 12, and 18—or, as of that time, 11 sessions scheduled up to that point. As already indicated, VanAman functions as a member of a utilities service "troubleshooter" work crew at Fort Wayne, whose shift hours, meshed with other members of the crew, are rotated (as above described) in the regular conduct of Respondent's public service utility operations. In order for VanAman[5] to attend

[5] The same is true, *mutatis mutandis,* for several other members of the 9-11-member union negotiating committee (i.e., Goddard and Alexander from the SB-BH-TB unit, Hammers and Jannie from the MA-MU unit, and Yocum temporarily only from the GO unit).

bargaining sessions for units other than his own at locations other than Fort Wayne, it would be necessary for him to travel to and from those locations, by day or night, and thus—as credibly and without contradiction indicated by Respondent's labor relations supervisor, Willmore—interfere with the operations of his work crew during the period of negotiations as well as two-way travel (and possibly added rest). This was the first year in which any problem arose involving proposed undue travel[6] by a union bargaining committee employee member to attend negotiating sessions of units other than his own.[7] The maximum travel distance involved (according to Union Business Manager Herriman) was 170 miles one way (Marion or Muncie to Benton Harbor) or a round-trip distance of 340 miles.

Approximate mileages[8] between the agreed negotiation sites for the four units in Respondent's different facilities are:

Fort Wayne to Muncie—68 miles
Fort Wayne to South Bend—81 miles
Muncie to South Bend—133 miles

Respondent's labor relations supervisor, Willmore, a highly credible witness, thoroughly knowledgeable in his Company's operations, testified and explained that the replacement of VanAman—a utilities "troubleshooter," on call around-the-clock as a member of a service crew on rotating shifts—as well as of Respondent's other four employee-negotiator "travelers," would have been "burdensome to administer." This testimony

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[6] In prior years, travel by employees for attendance at negotiating sessions had, with one possible exception (Alexander in 1971), apparently been slight and inextensive.

[7] Prior to 1975, the maximum number of days of leave requested by any employee to attend negotiation sessions was perhaps 2 days—in contrast to the 11 days plus necessary travel time sought by VanAman (without reference to the others) for the period from October 29 to December 18 alone.

[8] Source: Rand McNally, *Standard Highway Mileage Guide,* 1973. These are road mileages. No rail or air carrier schedules or data have been provided by the parties.

was wholly uncontroverted by General Counsel or the Charging Party and is credited, and I so find.

On October 21, VanAman was denied the requested permission other than for the four negotiating sessions then scheduled for his own unit at Fort Wayne.[9] The other employee "travelers" were similarly denied such permission. The Union thereupon canceled all further meetings of *all* of the four units (including those to which VanAman or the other "travelers" would not have to travel). On October 23, Respondent informed the Union that it stood ready to continue negotiations "at reasonable times." A further but abortive bargaining session—the fifth[10]—took place on October 29 at South Bend for the SB-BH-TB unit, attended by six union negotiators (including four from the local bargaining committee, but no "travelers"). Since Respondent had declined to permit employee members of the bargaining committee ("travelers") to travel from distant locations (at which they were employed in other plants of Respondent) to that meeting, the Union refused to proceed with the meeting and called off all negotiations until Respondent altered its position.

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[9] It is to be observed that the permission thus extended to VanAman did not include the four scheduled GO unit sessions, also to be held in Fort Wayne. Negotiating committee employee members Alexander (SB-BH-TB unit) and Hammers (MA-MU unit) were similarly denied permission to absent themselves from work in order to travel to attend negotiating sessions of units of which they were not members.

[10] Previous bargaining sessions had been held on September 23, 1975, at South Bend for the SB-BH-TB unit with 9 union representatives, 4 of whom were travelers; on October 1, 1975, at Muncie for the MA-MO unit with 11 union representatives, 3 of whom were travelers; on October 8 and 9, 1975, at South Bend for the SB-BH-TB unit with 9 union representatives, 3 of whom were travelers. "Travelers" are committee employee members, present and included in the total number shown, who traveled to the bargaining location from distant plants at which they were employed. Neither "travelers" nor nontravelers were paid by the Company while attending or traveling to and from bargaining sessions; they were merely excused from work.

The Union filed its charge herein on October 30, accusing Respondent of failing and refusing "to bargain collectively and in good faith" with it, "in that the employer has refused to meet at reasonable times and places when so request. . . . and in addition. . . has prevented certain of the union's bargaining committee members from attending bargaining sessions by refusing said committee members time off work."

On November 10, the Union wrote Respondent that by reason of "inflationary pressures" the employee-members of the bargaining committee "can no longer afford to lose time from work in order to negotiate agreements," and that the bargaining committee would be "unable to meet for negotiations, for any of the bargaining units. . . until such time as negotiations are held outside the normal working hours of the employee members of the bargaining committee. . . at any reasonable time and place.[11]

Also on November 10, as well as on November 12, in letters to its employees in the four bargaining units here involved, Respondent pointed out that the "normal date of November 1 for a new contract has passed" since negotiations had been suspended by reason of the circumstances which have been described; reminded the employees that there were four "separate and distinct" bargaining units; stated that although the Board had refused a union application to consolidate those units, the Union was continuing its attempts to effect a consolidation "through coordination of negotiations"; insisted on its right to conduct "separate negotiations for each unit"; stated that it did not consider itself legally obligated to excuse employees of one unit from their work assignments to attend negotiations of the other units; stated that it stood "ready to

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[11] Although the first two paragraphs of this union communication (G.C. Exh. 6-0) refer to the "normal working hours of the *employee* members" of the bargaining committee, the final paragraph limits the Union's willingness to meet for negotiations to "any reasonable time and place outside the normal working hours of *the committee.*" (Emphases supplied.) The bargaining committee includes members other than employees of Respondent.

resume negotiations at [the particular plants or places] during normal working hours, the same as in previous years"; and said that it hoped negotiations on substantive matters could be resumed shortly and agreements reached.

On November 21, Respondent, replying to the Union's foregoing letter of November 10, advised the Union that "Our position on night and weekend meetings is that they are not necessary or desirable except when they are an extension of a meeting held during normal business hours[12] and when a contract expiration date is so near that extended meetings are required. Indiana & Michigan and Local 1392 have adhered to the practice stated above for many years"; that the Company considered it "unreasonable, under the present circumstances, to ask members of the various company committees to devote their nights or weekends to negotiations"; and that "We are ready to resume negotiations in each of the four affected bargaining units at any reasonable place and time."[13]

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[12] I.e., 8 a.m. - 5 p.m., Monday through Friday. It is noted that, consistent with this policy, after the resumption of negotiations (as will be shown), the bargaining session of January 14, 1976, at South Bend was—according to Union Business Manager Herriman—continued past midnight.

[13] Respondent had similarly orally advised the Union, as well as a Federal mediator. According to Union International Representative Bailey, subsequent to the aborted October 29 negotiating session he asked Respondent's labor relations supervisor, Willmore, to meet on the following Saturday—a nonworking day—or on any Saturday, Sunday, or evening when VanAman, then assigned to the 4 p.m.-*midnight* shift, as well as other negotiating committee members (totaling 9-11) would be available to attend. According to Bailey, Willmore declined to schedule such a negotiating session or sessions; according to Willmore, he had acceded to such a request on October 29, but without discussion of attendance by "travelers." It is to be noted that, whatever its validity in terms of company policy and the parties' former practice, work efficiency (fatigue, etc.), expense and inconvenience, executives' as well as employees' morale, etc., the objection to "distant traveling" relates to off-hour, nonworking day

(footnote continues)

The testimony of Respondent's labor relations supervisor, Wilmore—an impressive witness who through his long tenure with Respondent and its personnel operations is thoroughly knowledgeable therein—is uncontroverted that regularly scheduled night and weekend negotiations not only by the members of its executive/managerial team involved therein, but also by its five employee-negotiator "travelers," considering their regular full daytime assignments, would be deleterious to their performance and morale and to the efficiency of Respondent's operations.[14] This testimony is substantially[15] uncontroverted, and is credited, and I so find.

(footnote continued)

bargaining as well. It is further noted, on the matter of nonworking day and evening sessions, that Respondent's negotiators numbered seven to nine, with one possible exception of all company executives (who not only have company responsibilities all day but also presumably maintain a certain lifestyle into which Respondent may not wish to intrude unduly without compelling reason).

[14] Thus, for example, Willmore explained:

> First of all, we are agreeable and willing to meet at night and on weekends as the policy has indicated. We are agreeable when it is necessary to conclude a negotiation or to reach agreement. We have not in the past refused to meet at night. As a matter of fact, in these particular negotiations, we did just that. The reason for not making it a regular time to meet was one, the fatigue aspect and that has been touched on already here. To anticipate that the members of the company committee as well as the union committee and I am primarily concerned with the company committee but both committees it does not seem to be reasonable to expect them to perform their normal day on an eight hour basis and then make the necessary arrangements to travel to the various locations for the purpose of conducting night sessions with any meaningful sessions. They would meet for a few hours and then turn around and go back to their respective locations for work

(footnote 14 continues)

[15] The only testimony which could be considered to the contrary in part, is that of Union Business Manager Herriman, dealing only

(footnote 15 continues)

On January 7, 1976, within a week after issuance by the Regional Director of the complaint herein (December 31, 1975, together with the Regional Director's setting down of the instant hearing for March 25, 1976), Respondent agreed without prejudice to excuse the employees in question from work during regular working hours, so as to permit negotiations

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(footnote 14 continued)

> the next day. So, that is my consideration as to the reasonableness of that type of an arrangement. Another reason is from the standpoint of proper conduct of the negotiations, I find it necessary on many occasions to contact the office staff to pursue research questions for me or to obtain statistics or answer to some questions that have been raised with regards to negotiations. And in order to have a meaningful and ongoing negotiation, I would endeavor to secure answers. If you are meeting at night, that source of information is not available again without special arrangements or overtime. It is not as available to me nor for that matter are various members of management who are not part of the negotiating team but who are supervisors and management personnel who are available to us when questions come up to have access to them and to call on and check facts on things that are mentioned in the negotiations. If we are meeting at night, their availability is a question. I think that perhaps a primary reason though is there is ample time and a reasonable amount of time during the normal business hours, five days a week, eight to five, to conduct negotiations which is the normal procedure to be followed.

(footnote 15 continued)

with "traveling" employee-negotiators. According to Herriman, such employees could, after completing a full day's work to 4 or 5 p.m., thereafter travel for 3 hours as much as 170 miles to a distant negotiating session, participate in negotiations to perhaps 2 a.m., and then for 3 hours drive back 170 miles to return for an efficient day's work the next morning. I reluctantly am unable to accept so optimistic a view.

to move forward without indefinite delay.[16] Shortly thereafter negotiations were resumed,[17] in consequence of which (with an intervening strike in all four units for the month of February) four separate 2-year collective agreements were concluded.

B. *Discussion and Resolution*

Notwithstanding resolution of the parties' differences in the collective agreements successfully concluded for each of the four bargaining units, the contention is here continued to be pressed that the Union had the absolute right, under the circumstances described, to insist on the presence of all of the employee-members designated by it to bargain at all sessions of each of the four widely geographically dispersed bargaining units. Respondent's countervailing position on this particular

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[16] In companion explanatory letters of the same date (January 7, 1976) to its employees, Respondent describes the situation, including the Regional Director's refusal to issue a complaint against the Union on Respondent's 8(b)(3) cross-charge (later sustained by General Counsel) that the Union was once again attempting to engage in "illegal coordinated bargaining" while at the same time issuing the instant complaint against the Employer on the Union's charge. Respondent has reasserted this contention by way of affirmative defense herein. At the instant hearing, Union Business Manager Herriman—called as an adverse witness by Respondent—conceded that since 1971 it remains an objective of his Union to bargain with Respondent as a single unit, "to keep the Company from whipsawing one union [unit] against the other."

As stated by Respondent to its employees in the January 7 communication, "Solely in the interest of resuming negotiations, we are agreeing to meet under terms to which we object . . . . We will pursue our position through legal channels, rather than at the bargaining table. In other words, let's get back to the bargaining table and conclude negotiations while the legal proceedings continue."

[17] At least 10 further sessions were preliminarily scheduled between January 14 and February 3, 1976. The agreements were concluded on March 5 (SB-BH-TB unit), March 2 (MA-MU unit), March 4 (FW unit), and March 5 (GO unit).

issue is that it had the right to impose reasonable restrictions for valid reasons consonant with its business needs as an operating public utility.

In a way the problem presented arises because the same employer is involved for all four bargaining units. It could hardly be contended, for example, that an employer violates the bargaining obligation by refusing to excuse his employees from work for the purpose of attending bargaining sessions of units other than that of the employees in the employer's own business, even though the employees are members of the bargaining committees of such other units but not of the units themselves (as, indeed, they may be, since bargaining units are not restricted to their own numbers in their selection of bargaining representatives).[18] At least in the hypothetical situation posed, it would appear that "the cardinal principal [is] that the existing unit . . . fixes the periphery of the bargaining obligation." *Utility Workers Union of America, AFL-CIO, and its Locals 111, et al. (Ohio Power Company)*, 203 NLRB 230, 238 (1973), enfd. 490 F.2d 1383 (C.A. 6, 1974). Although it may well be that the rule should be no different where an employer—as here—has more than one, perhaps many, units in geographically widely dispersed plants in its industrial empire,[19] the disposition here reached renders resolution of that issue unnecessary.

The basic issue here tendered is the result of the respective parties' attempted simultaneous application of two established principles; *viz*, (1) the principle that employees are entitled to negotiate collectively through representatives of their own choosing (NLRA, Sec. 7), without employer interference, restraint, or coercion (*id.*, Sec. 8(a)(1)), and (2) the principle that employees do not have the right to require that collective

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[18] *General Electric Company*, 173 NLRB 253 (1968), enfd. 412 F.2d 512 (C.A. 2, 1969); *Minnesota Mining & Manufacturing Company*, 173 NLRB 275 (1968), enfd. 415 F.2d 1974 (C.A. 8, 1969).

[19] The parties have not referred me to any such decision.

negotiations be carried on in such a way as to disrupt or interfere unduly with the conduct of their employer's business.[20]

Where a clash would result from the application of two statutory or salutary principles such as these, commonsense, respect for the Act's purposes, and deference to the Board's policies and administrative methodologies—including the desirability of withholding a heavy regulatory hand where not called for—require that they be attempted to be reconciled without affront to either or rejection of both.

Respondent does not quarrel with the broadly stated proposition that its employees are entitled to designate their bargaining representatives, including representatives who are not members of the particular bargaining units. Although this proposition as a statutory as well as philosophical generality allows of no dispute, it, too, in practical application may be subject to necessary qualifications. Thus, for example, in case of collective bargaining for Unit A, if its employee-negotiators consist of or include all or so many employees of Unit B that the effect of excusing them from work in Unit B for the purpose of participating in (as well as traveling to and from) prolonged Unit A negotiations during working time would be to compel the shutdown of the operations of Unit B, to the substantial economic detriment of the employer (as well as of all employees of Unit B and employees of other dependent segments of the business), the employer would not be required to do so. Similarly—as this case—a public utility would not be required to suspend its service obligations to the public in order to comply with an inflexible demand to bargain through specified individuals at specified locations which would necessitate such a public service suspension. In such situations, various possible solutions or compromises could be made; for example, modi-

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[20] Cf, e.g., *Tennessee Chair Company, Inc.* 126 NLRB 1357 (1960), *Converse Bridge and Steel Company,* 49 NLRB 374 (1943).

fying the composition of the employee negotiating team,[21] or conducting negotiations at times (e.g., evenings or nonworking days) suitable to both sides.

The same is largely true with regard to the places as well as times of scheduled negotiations. Thus, even within the framework of deference to the principle that employees are entitled to bargaining representatives of their own choosing, an employer could hardly be faulted for hesitating to sanction or accede to prolonged or frequently repeated absences on a continuing basis of a key employee who cannot reasonably be spared repetitively without undue disruption to the employer's productive operations or administrative machinery. Situations such as these are normally resolved by fair and reasonable changes, adjustments, and compromises between the negotiating parties. And so they were here, by Respondent, to its credit. Respondent initially (first four negotiating sessions) excused from work those of its employees who in connection with their membership on the union bargaining committee were required to travel to participate in the negotiating sessions of units other than their own; but it later, commencing on October 21, when confronted with Fort Wayne "troubleshooter" crew employee

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[21] There have been cases where employer insistence on the presence of a particular negotiator, who because of other commitments interfering with his availability is a roadblock to negotiations or slows their pace to a crawl, has been considered not to meet the Act's good-faith bargaining expectations, and thus to evidence bad faith such as to constitute unfair labor practice. Cf. *Radiator Specialty Company,* 143 NLRB 350, 369 (1963), enfd. in part only 336 F.2d 495 (C.A. 4, 1964); *Solo Cup Company,* 142 NLRB 1290, 1295 (1963), enfd. 332 F.2d 447 (C.A. 4, 1964); *Insulating Fabricators, Inc., Southern Division,* 144 NLRB 1325, 1326-29 (1963), enfd. 338 F.2d 1002 (C.A. 4, 1964); *Skyland Hosiery Mills, Inc.,* 108 NLRB 1600, 1605 (1954); *"M" System Inc., Mobile Home Division Mid-States Corporation,* 129 NLRB 527, 549 (1960); *Franklin Equipment Company, Inc.,* 194 NLRB 643, 645-646 (1971); *Pepper & Tanner, Inc.,* 197 NLRB 109, 121-122 (1972), enfd. in material part 474 F.2d 1256 (C.A. 6, 1973). Undoubtedly the same standard would apply to a union negotiator.

VanAman's request to be excused for no less than 11 more working days,[22] limited its permission so as essentially to eliminate attendance at locations to which further travel was required. Whether or not that limitation was under the circumstances reasonable is of no real significance, since Respondent later withdrew the limiation,[23] thereby permitting the negotiations—stalled by the Union's refusal to proceed unless all of the employee-members of its bargaining committee were excused from work during all of the days involved so as to attend all negotiations of all units, regardless of their date, time, locale,[24] and number, or unless rescheduled for evenings or weekends[25] — to proceed to successful conclusion and execution of collective agreements.

In the described situation, to fault Respondent because it initially declined to excuse several of its employees from work for many repeated days to travel to and from and attend each and every one of the numerous sessions of its seemingly rather large negotiating committee, for bargaining for units other than their own at geographically distant locations, would not, at this time at any rate, in view of what has transpired, achieve any essential purpose. Respondent itself withdrew the antitravel "modification" it imposed, even though it cannot be said—and is unnecessary here to determine—that that "modification" was under all of the circumstances unlawful. Thus, even assuming Respondent should not have made the "modification" (i.e., travel restriction) when it did—perhaps particularly since it was made "midstream" during the negotiations, although even so it

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[22] Indeed, possibly more, depending upon travel distances and related physical needs.

[23] After issuance of the complaint herein, it is true.

[24] As distant as 340 miles roundtrip.

[25] I am unaware of any absolute right of a party to insist that negotiations be *scheduled* for and confined to nights, weekends, and nonworking days, nor have I been cited to any authority to that effect. The Union itself appears to have abandoned this position, which it based upon "inflationary pressures," *supra*.

cannot absolutely be said that the "modification" was utterly uncalled for under the circumstances, much less that it was unlawful—Respondent has itself remedied and cured its own lapse, if such it was.

It remains to consider the contention pressed herein that a remedial order is nevertheless essential so as to eliminate the possibility of similar action in the future by Respondent. While I am familiar with the general principle—again a broad philosophical one—that in labor cases, at any rate, repentance and correction do not erase nor perhaps even mitigate transgression against the Act's command,[26] the matter is not that simple and does not, in my opinion, require or warrant wooden application of the principle, salutary as it is in situations unlike those here presented. Here, the parties have enjoyed a long[27] and successful[28] collective-bargaining relationship, a byproduct of which was Respondent's allowance of time off to employee negotiating committee members in prior year for travel to negotiating sessions of other units—not it is true, of the order here demanded in 1975,[29] but no comparable demand had been presented prior to the 1975-76 negotiations. Although Respondent maintains that it was correct in its antitravel "modification" under the circumstances shown, and that it therefore would have the right to continue that "modi-

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[26] Cf., e.g., *N.L.R.B. v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950).

[27] Since 1934—upwards of 40 years—as shown above.

[28] Even if not altogether storm free. See fn. 1, *supra*.

[29] E.g., as shown above, at least 11 extra working days for Fort Wayne "troubleshooter" team member VanAman alone. It is unnecessary to determine whether Respondent's antitravel "modification" was improper insofar as it applied to negotiating committee employee members *other* than VanAman, in view of the Union's refusal to proceed with negotiations unless *all* employee-members of its negotiating committee, *including* VanAman, were excused from work by Respondent in order to attend all of those meetings. However, that union condition substantially potentiated the level of its demand.

fication"[30] in the future under similar (or more aggravated) circumstances if so advised, it is hardly fair to consider this as other than either (1) an understandable disinclination to confess a guilt it does not feel in the instant case, or (2) a no less understandable desire to maintain the integrity and elasticity of its not unreasonable position that it will not commit itself to an advance "blank check" authorization to allow employee absences totally unlimited in quantity, time, and space.[31] I could not fault Respondent in either eventuality or contingency. More basically, I consider it neither necessary nor advisable—if, indeed, practicable or even possible—to design a master rule as to just how many days, hours, and travel miles should be allowable or allowed for how many employees in how many categories in how many places who may desire to participate in future negotiations between the parties involving units to which they do not belong. The factual permutations and combinations are so extensive and the factors involved so numerous

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[30] I have been enclosing modification in quotes because it does not seem entirely accurate to denominate the 1975-76 antitravel policy as a real modification, in view of the fact that no comparable situation (i.e., VanAman's requested 11 or more additional days off in October-December 1975 alone) had occurred in previous negotiations. Thus, no style or policy had developed of permitting unlimited absences, or absences of the extent requested during the 1975-76 negotiations.

[31] Thus, while the "right" of employees to representatives of their own choosing is indeed strong, it is not absolutely immutable. *General Electric Company v. N.L.R.B.*, 412 F.2d 512, 517 (C.A. 2, 1969); *N.L.R.B. v. International Ladies' Garment Workers' Union, AFL-CIO* [*Slate Belt Apparel Contractors Assn.*], 274 F.2d 376, 378-379 (C.A. 3, 1960); *N.L.R.B. v. Kentucky Utilities Company*, 182 F.2d 810 (C.A. 6, 1950). General Counsel here has in no way established that Respondent's complained of action was unlawfully motivated or otherwise improper under the Act, or that it was for reasons other than nondiscriminatory, perceived, bona fide, operational needs.

and discrete,[32] as to elude precise or practical formularization.[33] One of the Act's core purposes is promotion of industrial peace through encouragement of collective bargaining. I believe that purpose would be ill served by attempted ritualization here of the methodology of future collective negotiations between the parties. Rather than promoting the policies of the Act, it would seem that such an attempted ritualization, even if it could be achieved, would create an impaction to the desirably supple peristalsis of collective negotiation. As in their 1975-76 negotiations, the parties may, and presumably will, in their future negotiations make such accommodative changes in their positions, views, and bargaining modes as are necessary, appropriate, and, hopefully, reasonable. Imbedded and implicit within the collective-bargaining philosophy is a sort of "fairness doctrine," applicable equally to both sides of the table—labor as well as management—as to the degree of accommodation each side may fairly or reasonably require of the other in order not to derail the bargaining process.[34] The parties here have

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[32] They include, for example, the "essentiality" (whatever that is) of the particular employee's task, the reasonable availability of adequate substitutes, his "normal" workshift hours and the feasibility of substitutions and adjustments, the size of the negotiating committee, the locus or loci of separate or combined (or of partially combined) negotiations, the distances and reasonable travel times involved, available media of transportation, replacements and substitutes (as well as "stand-ins," as on previous occasions herein) on the negotiating committee, and even the "pace" of the negotiations themselves.

[33] In an dissimilar context, I had previous occasion to eschew performance of the service of planning for Board litigants "safe industrial menus" at employers' preelection banquets for employees. *Preston Products Company, Inc.*, 158 NLRB 322, 347 (1966), enfd. 387 F.2d 801 (C.A.D.C., 1967), cert. denied 392 U.S. 906 (1968).

[34] Thus, for example, as pointed out above, an employer may not employ dilatory tactics such as insisting that it requires the attendance of a particular collective negotiator and no other, when that individual is continually busy with other matters. In such a situation, the employer's right to representation by the negotiator of its first choice is required to yield to the more important requirement that the normal

(footnote continues)

successfully surmounted all of their differences in their 1975-76 negotiations, including that arising out of Respondent's antitravel "modification" under the circumstances described. That "modification" itself could be considered to fall into the category of the many positions and stances, some perhaps ill-conceived and some possibly even technically violative of the Act at any rate if persisted in (e.g., a sorely tried negotiator exclaiming, "I refuse to negotiate with anybody like you" and striding from the negotiating table, only to return the next day to resume negotiations), which are not uncharacteristic of the normal peristalsis of collective bargaining. It may be questioned whether excessive regulatory policing of such matters, which the parties themselves have repaired, subserves the fundamental policies of the Act and is calculated to promote industrial peace, rather than to accomplish the opposite by reopening old sores.

As has a number of times been indicated, the antitravel "modification" which stalled the parties 1975-76 negotiations was rescinded, enabling the parties to bring their interrupted negotiations to a successful conclusion. Whether or not that or any like "modification" will be suggested, imposed, withdrawn, or relaxed in the future—with or without justification, depending upon a kaleidoscope of possibilities which cannot be dimensioned—is impossible to predict. Since I consider it inapproprite as well as unnecessary at this point, with the problem solved and no outstanding problem now requiring decision, to assume that Respondent, any more than the Union —with their demonstrated long history of successful collective-bargaining relationships—has arrived at a fixed purpose not to make reasonable accommodations or to predict with assurance that it will not do so in the future, or now to brand Respondent (who is free from taint of previous record of violation of the

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(footnote continued)

peristalsis of collective bargaining be permitted to proceed; thus, two seemingly conflicting rights are accommodated to each other, averting head-on clash and the imposition of harsh edict and creation of bad law. It would seem that here, too, it is not unreasonable to expect pliability on both sides in future negotiations, and there is no reason now to assume its future absence.

Act) as a lawbreaker under the circumstances shown, and for all of the other reasons which have been explicated,[35]

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[35] *Westinghouse Electric Corporation*, 132 NLRB 406 (1961), relied upon by General Counsel, is different. There, unlike here, an employee (Babcock) was president of the union as well as chairman *ex officio* of its in-plant negotiating committee. There were two units in the plant, a professional unit and a technical-clerical unit. Babcock was a member of the professional unit. There came a time when the professional unit was voted out. Babcock's offer to resign his union post was rejected by the membership, leaving him as negotiator for the technical-clerical unit. At this point, the employer refused to allow Babcock time off during working hours to participate in negotiations for the technical-clerical unit and at the same time refused to negotiate after Babcock's working hours, but offered to negotiate with Babcock if he would surrender his position as a professional engineer and take a nonprofessional job in the technical-clerical unit. Under these rather unique circumstances, the Board held Sec. 8(a)(5) violated, stressing the "drastic" nature of the "alternative offered Babcock, of sacrificing his professional career in order to continue serving his Union" as its only knowledgeable available negotiator, while stating that "each of these restrictions may by itself have been reasonable" (132 NLRB at 407.) Thus, in contrast to the instant case, in *Westinghouse* (1) only a single plant, with no distant travel and complex personnel substitutions, was involved; (2) only one, the chief bargaining representative was involved; (3) the bargaining representative was the key negotiator (and one of only two negotiators); (4) the employer brought rigorously "drastic," unacceptably indecent pressure upon the key negotiator to sacrifice his professional career as to its price tag for making it possible for him to negotiate; (5) no necessity or justification was established for the employer's action; and (6) the employer did not rescind its action; furthermore, (7) the union substituted somebody else for Babcock and an agreement was consummated; and (8) even so, the Board cut back the recommended Order so as to limit it merely to a requirement that the employer bargain with the union "at reasonable and *mutually* convenient times without regard to whether the [u]nion's representatives are employees in the certified [technical-clerical]unit." (Emphasis supplied.)

(footnote continues)

I shall recommend dismissal of the complaint.[36]

Upon the foregoing findings and the entire record, I state the following:

CONCLUSIONS OF LAW

1. Jurisdiction is properly asserted in this proceeding.

2. Under all of the circumstances shown and upon the record as a whole, it has not been established that Respondent

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(footnote continued)

Harley Davidson Motor Co., Inc., AMF, 214 NLRB 433 (1974), where the Board held an employer in violation for refusing to bargain with the union unless the union confined its negotiating team to its elected bargaining committee composed of unit employees plus a single representative of the union's parent international, is likewise a far cry from the situation here.

[36] In view of the disposition herein made, it is unnecessary to deal with other important contentions raised by Respondent in its affirmative defense concerning the Union's alleged persistent attempt to change the nature of the certified separate bargaining units, which Respondent asserts constitutes bad-faith bargaining, relieving Respondent from performance *strictissimi* of its own bargaining obligation or "preclud[ing] the existence of a situation in which the employer's own good faith can be tested" (*Times Publishing Company, Evening Independent, Inc., News Printing, Inc,* 72 NLRB 676, 683 (1947)). Cf. *Utility Workers Union of America, AFL-CIO, and Locals 111, et al. (Ohio Power Company),* 203 NLRB 230 (1973), enfd. 490 F.2d 1383 (C.A. 6, 1974); *Shell Oil Company,* 194 NLRB 988 (1972). enfd. 486 F.2d 1266 (C.A.D.C., 1973). This determination also moots all issues, if any, involving the vacating at the hearing of Respondent's *subpoenas duces tecum* seeking to elicit material to establish the affirmative defense.

"Coordinated bargaining" in itself is not unlawful provided it does not comprise unilateral insistence on combining separate bargaining units. *Shell, supra,* 486 F.2d at 1268; *Harley Davidson Motor Co., Inc., supra,* fn. 35, and cases cited.

The Regional Director's and General Counsel's refusal to issue a complaint upon Respondent's charges so as to permit the litigation of the issues tendered by Respondent's affirmative defense is of course in no way determinative of the possible validity of that defense here, that obviously being a matter for judicial and not prosecutory determination.

has violated the National Labor Relations Act, as amended, and that the issuance of a remedial order herein would effectuate the policies of the Act.

[Recommended Order for dismissal omitted from publication.]

Characteristics of Major Collective Bargaining Agreements, July 1, 1976

U.S. Department of Labor
Bureau of Labor Statistics
1979

Bulletin 2013

* * *

Part V. Paid and Unpaid Leave

Leaves of absence
Vacation and absence allowances
Plant shutdown for vacations
Holidays
Other payments for time not worked
Time spent on union business

* * *

Table 5.1 Leaves of absence by industry
(In agreements covering 1,000 workers or more, July 1, 1976)

Industry	Leave for— All agreements		Union business		Education		Military service		Maternity paternity		Personal reasons	
	Agreements	Workers	Agreements	Workers	Agreements	Workers	Agreements	Workers	Agreements	Workers	Agreements	Workers
All industries	1,570	6,741,750	933	4,277,900	132	781,600	920	4,459,150	601	2,246,300	784	3,401,650
Manufacturing	826	3,398,500	642	2,614,550	113	730,200	624	2,856,350	408	1,393,550	542	2,261,300
Ordnance, accessories	14	36,300	13	34,400	4	7,350	13	34,800	10	25,350	12	32,550
Food, kindred products	104	301,250	68	229,300	5	12,000	76	188,800	52	119,050	72	231,350
Tobacco manufacturing	9	27,700	6	15,950	—	—	3	10,250	6	20,350	4	9,150
Textile mill products	15	42,450	15	42,450	—	—	11	33,950	14	41,450	11	29,150
Apparel	41	298,700	14	36,850	—	—	23	204,850	21	72,200	20	87,700
Lumber, wood products	9	14,750	5	8,550	—	—	6	9,750	1	2,200	3	4,850
Furniture, fixtures	17	27,650	11	18,600	2	2,500	11	16,500	9	15,900	12	17,450
Paper, allied products	53	98,600	41	77,100	3	4,650	44	81,550	24	50,650	35	67,250
Printing and publishing	22	44,800	11	16,400	2	3,400	10	15,400	5	9,750	5	6,000
Chemicals	42	103,750	37	95,600	4	5,450	29	75,150	11	29,700	26	63,700
Petroleum refining	13	26,850	12	24,150	1	1,900	9	17,800	—	—	9	18,250
Rubber and plastics	13	34,800	13	34,800	2	16,300	13	34,800	12	19,800	11	18,500
Leather products	14	34,900	7	16,850	—	—	7	15,550	7	22,600	6	21,200
Stone, clay, and glass	35	94,600	29	86,000	4	17,500	26	81,050	20	46,950	19	48,200
Primary metals	90	506,500	75	346,850	31	286,550	78	481,800	14	151,200	47	239,300
Fabricated metals	36	83,600	28	68,350	5	6,350	28	68,900	15	45,500	24	60,200
Machinery	95	274,100	87	249,100	20	99,200	79	250,850	55	184,700	83	216,050
Electrical machinery	86	313,850	75	278,750	9	26,150	62	267,150	68	285,100	55	175,700
Transportation equipment	98	986,400	79	898,950	21	240,900	79	924,700	51	221,050	71	876,300
Instruments	10	24,550	8	17,050	—	—	9	23,450	9	23,050	8	17,050
Miscellaneous manufacturing	10	22,400	8	18,500	—	—	8	19,300	4	7,000	9	21,400
Nonmanfacturing	744	3,343,250	291	1,663,350	19	51,400	296	1,602,800	193	852,750	242	1,140,350
Mining, crude petroleum, and natural gas	14	152,450	13	148,650	2	7,200	9	21,050	2	3,750	8	14,350
Transportation[1]	62	573,000	47	529,600	—	—	47	540,050	7	36,700	25	180,200
Communications	63	437,450	61	424,150	4	10,600	42	319,400	28	212,050	32	258,200
Utilities, electric and gas	57	166,950	51	143,550	3	8,600	42	126,050	10	21,800	26	94,150
Wholesale trade	16	28,600	8	13,700	1	1,350	8	13,750	7	14,850	9	18,750
Retail trade	120	432,350	71	238,000	—	—	90	299,950	96	383,250	77	290,200
Hotels and restaurants	42	177,600	9	31,150	—	—	20	95,250	14	54,700	22	118,850
Services	64	304,900	20	102,400	8	22,450	27	132,500	28	124,450	29	139,250
Construction	303	1,066,200	9	29,450	—	—	11	54,800	—	—	11	22,650
Miscellaneous nonmanufacturing	3	3,750	2	2,700	1	1,200	—	—	1	1,200	3	3,750

[1] Excludes railroads and airlines.

NOTE: Nonadditive.

Table 5.15 Applicability of paid meal period and pay for time on union business*
(In agreements covering 1,000 workers or more, July 1, 1976)

Applicability	Agreements	Workers
Pay for time on union business		
All agreements	1,570	6,741,750
Total referring to pay for time on union business	817	3,643,500
Grievance and/or arbitration	312	1,263,600
Contract negotiations	7	15,750
Other union business[1]	195	722,500
Grievance, arbitration, and contract negotiations	49	129,850
Grievance, arbitration, and other union business	167	1,173,750
Contract negotiations and other union business	8	72,050
Grievance, arbitration, negotiations, and other union business	36	139,100
Other[2]	43	126,900
No reference to pay for time on union business	753	3,098,250

[1] Other union business includes time spent collecting union dues, checking union cards, accompanying sick or injured employees to medical facilities, attending labor-management committee meetings, and similar activities.

[2] Includes 43 agreements that refer to no specific type of activity.

* Portion of table relating to paid mail period deleted.

Nonproductive Time

—Pay for Contract Negotiations

Some contracts provide pay for negotiating time which coincides with regular working time. Certain limitations may be specified, however—for example, a restriction on the number of employees entitled to such pay or on the aggregate number of compensable hours.

Extent of Pay—

—At regular rate for time lost from work

Members of the Employee's Labor Relations Committee shall receive their regular rate of pay for the time spent in negotiations and grievances meeting provided such time is actually lost from work. (ICI America Inc. *and* Chemical Workers; exp. 1/76)

—For all time lost from regular working hours

The Company agrees to pay the Negotiating Committee for all time lost from regular working hours spent at actual negotiations around the bargaining table. (McNeil Corporation, Lincoln St. Louis Div. *and* Auto Workers; exp. 6/77)

—For time during regular work hours up to 48 hours

The Company agrees to negotiate during regular work hours on matters of contract or supplements thereto and will pay local Union representatives for such time, but not beyond the first forty-eight (48) hours. Should further negotiations be required, meetings will be held after regular work hours. In the event the Company desires to continue negotiations during regular work hours, they will pay for all time lost by the local Union representatives at such meetings. (Dana Corp. *and* Auto Workers; exp. 12/76)

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—For eight hours per day during last seven days of agreement

The Dana Bargaining Committee will be paid for eight (8) hours for each day it is available for consultation with the Master Negotiating Committee during the last seven (7) days of the Collective Bargaining Agreement or as mutually agreed by the Central Office and the UAW International Dana Department. The rate of pay shall be the rate the employee would have earned if he had worked on his regular job. (Dana Corporation *and* Auto Workers; exp. 12/76)

—Limited to specified number of employees from each plant

Employees acting as union representatives and engaged in multiple plant contract bargaining will be paid eight (8) hours' straight time pay for each day the parties meet to negotiate. This will be limited to two (2) employees from the Allentown plant, one (1) employee from the Denver plant, two (2) employees from the Logansport plant, two (2) employees from the Los Angeles plant, one (1) employee from the Memphis plant, and one (1) employee from the Cleveland Engineering Center. (ESB Inc., Automotive Division *and* Auto Workers; exp. 4/77)

—Limited to three members of negotiating committee

Negotiating meetings will be held during working hours of the day shift and the Company agrees to compensate not more than three (3) members of the employee negotiating committee at their base rate of pay. (General Iron Works Co. *and* Boilermakers; exp. 5/77)

—Full for first 10 negotiation meetings—half-pay thereafter

The Company will pay for all time lost from scheduled work for attendance at the first ten (10) regularly called negotiating meetings (refers to each series required because of a negotiated reopener, or contract expiration, or other major negotiations agreed to by the parties during the term of the Agreement) at average straight-time hourly earnings by active Scoville employees who are member of the Union Negotiating

Committee and who are certified to the Company in writing by the Union. Such certifications to be limited to 17. For all other meetings of the Company-Union Negotiating Committee, the Company will pay one half of time lost at average straight-time hourly earnings, subject to the same limitations. Regularly scheduled 2nd and 3rd shift employees on the Committee will be paid as though they were on the first shift. (Scovill Mfg., Co., Waterbury Divs. *and* Auto Workers; exp. 10/75)

No Pay for Contract Negotiations—

—For any employee

Any employee and any Union representative who is an employee shall not be paid for time spent in negotiating any collective bargaining agreement with the Company. (Singer Company *and* Machinists; exp. 1/76)

—Time counted for vacation and holiday eligibility

Time spent in contract negotiations with the Company . . . shall not be paid for . . . but such time will be counted as time worked toward the criteria established for vacation and holiday eligibility. The Budd Co., Polychem Div. *and* Textile Workers (UTWA); exp. 9/75)

Supreme Court, U.S.
FILED
DEC 18 1979
MICHAEL RODAK, JR., CLERK

No. 79-564

In the Supreme Court of the United States

OCTOBER TERM, 1979

INDIANA & MICHIGAN ELECTRIC COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 599 F. 2d 185. The Decision and Order of the National Labor Relations Board (Pet. App. 21a-51a) is reported at 229 N.L.R.B. 576. The Board's Supplemental Decision and Order (Pet. App. 16a-20a) is reported at 235 N.L.R.B. No. 159.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1979. A petition for rehearing was denied on July 11, 1979 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on October 5, 1979. The jurisdiction of this Court is invoked under 28 U.S. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act by preventing certain employee members of the Union's collective-bargaining committee from participating in negotiating sessions outside their own bargaining units through denying them leave without pay for that purpose, while at the same time refusing to hold negotiating meetings during non-work hours.

STATUTE INVOLVED

Sections 8(a)(5), 8(d), and 9(a) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), 158(d), and 159(a), are set forth at page 3 of the petition for a writ of certiorari. Other relevant provisions of the Act are as follows:

> Section 7. Employees shall have the right to * * * bargain collectively through representatives of their own choosing * * *.
>
> Section 8(a). It shall be an unfair labor practice for an employer—
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7 of the Act].

STATEMENT

1. Petitioner ("the Company"), an electric utility, and the Union[1] are parties to four collective bargaining agreements that separately cover Company employees in four bargaining units in Indiana and Michigan (Pet. App. 30a-31a).

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[1]Local 1392, International Brotherhood of Electrical Workers, AFL-CIO.

In the 1975-1976 collective-bargaining cycle, the four existing contracts expired on different dates between October 31 and December 31, 1975, and the parties set separate schedules for renewal negotiations in each of the units (Pet. App. 32a-33a). During the ensuing negotiations, the Union was represented by a single bargaining committee of 9 to 11 members. The committee consisted of the Union's business manager, a Union international representative, employee members of the unit to which the bargaining in question directly pertained, and approximately four employee members known as "travelers"—drawn from the other units (Pet. App. 17a, 33a-34a & n.5, 35a n.10). Some of the travelers were elected by the employees and other were appointed by the Union leadership (Tr. 146-148). In prior years, the Union had made limited use of travelers in collective negotiations (Pet. App. 34a & nn.6 & 7). In the 1975-1976 cycle, travelers participated without Company protest in the first four bargaining sessions—September 23, October 1, October 8, and October 9. The Company excused from work, but did not pay, any of the employee negotiators for the time spent attending or traveling to and from negotiations (Pet. App. 17a, 33a-35a & n.10).

At the conclusion of the October 9 session, the parties agreed upon 11 additional bargaining dates for the four units (Pet. App. 33a). Shortly thereafter, Lyle VanAman, a traveler who was a member of the Company's "trouble-shooter" service crew, requested 11 days' leave to participate in the scheduled bargaining sessions. Around October 21, the Company denied VanAman and the other travelers permission to take leave without pay in order to attend negotiations in units other than their own. The Company justified this action on the alleged

ground that such leave, particularly in the case of VanAman, would be burdensome to administer and that the Union's use of travelers was an attempt to effect Company-wide bargaining (Pet. App. 22a, 33a-35a).[2]

On October 29, 1975, the fifth bargaining session was aborted when the Company adhered to its position regarding travelers and the Union refused to proceed without their participation (Pet. App. 35a). On October 30, the Union filed the underlying unfair labor practice charge complaining of the Company's position on travelers (Pet. App. 36a).[3] At about the same time, the Union asked the Company for a negotiating meeting on the following Saturday, which was not a regular working day, or on any Saturday, Sunday, or evening when travelers would be able to attend (Pet. App. 37a n.13). On November 10, the Union followed up with a letter to the Company requesting negotiations outside normal working hours to permit the attendance of the union bargaining committee (Pet. App. 36a). On November 21, the Company responded with a letter rejecting the alternative proposal on the grounds that " 'it [would be] unreasonable, under the present circumstances, to ask

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[2]In 1971, after their petitions requesting establishment of a single Company-wide bargaining unit had been dismissed by the Board's Regional Office, the Union's predecessor locals, each representing a separate unit, merged into the Union. The Company agreed to recognize the Union so long as the separate identities of the bargaining units were maintained (Pet. App. 31a n.1).

[3]The Company also filed a charge contending that the use of travelers was an attempt to compel Company-wide bargaining; that charge was dismissed by the Board's Regional Office (Pet. App. 40a n.16).

members of the various company committees to devote their nights or weekends to negotiations' " (Pet. App. 37a).[4]

2. The Board, one member dissenting, held that the Company's refusal to grant travelers uncompensated leave to permit them to engage in bargaining during working hours, while simultaneously refusing the Union's request to bargain during nonworking hours, violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by interfering with the Union's right to select its own bargaining representatives (Pet. App. 22a-23a). Noting that the Company's principal defense was that VanAman could not be spared for an aggregate of 11 days, the Board pointed out that the Company was free either to deny the travelers' request for unpaid leave and grant the Union's request for bargaining outside working hours so that the travelers could participate or to grant the former request and deny the latter (*ibid.*). The violation, the Board held, resulted from the Company's simultaneous denial of both (Pet. App. 22a). As the Board explained, the Company "cannot have it both ways," where the result is to frustrate the employees' right to representatives of their own choosing (Pet. App. 23a).[5]

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[4]After the issuance of the instant unfair labor practice complaint on December 31, the Company agreed, without prejudice to its legal position, to excuse travelers from work to permit resumption of negotiations. In March, the parties concluded four separate contracts, one for each of the units (Pet. App. 36a, 39a-40a & n.17).

[5]In its supplemental decision the Board rejected the Company's affirmative defense that the use of travelers was an attempt to compel Company-wide bargaining. The Board stated that "[t]he presence of travellers was not inherently incompatible with four-unit bargaining," and concluded that the evidence did not establish that "acceding to one of the Union's alternative positions on the traveller issue necessarily would have forced bargaining beyond the scope of the recognized bargaining units * * *" (Pet. App. 19a).

3. The court of appeals upheld the Board's decision and enforced its order. The court agreed with the Board that the Company's conduct effectively denied the employees representation by their chosen negotiators; and it held that the Board properly concluded, on this record, that any "economic hardship or managerial disruption suffered by the Company" was outweighed by the employees' right to select whomever they wished to represent them in bargaining negotiations (Pet. App. 9a-10a). The court also agreed with the Board that the Union's insistence that the travelers participate in the negotiations did not amount to "a union forced company-wide bargaining situation" (Pet. App. 10a). Accordingly, the court held that "the Board's conclusions based upon the particular facts of this cause are supported by law" (Pet. App. 11a).

The court denied the Company's petition for en banc rehearing (Pet. App. 14a-15a).

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with the ruling of any other court. Further review is unwarranted.

The law is clear that employees and their designated bargaining representatives have the right, with rare exceptions, to select whomever they wish to represent them in bargaining negotiations. See, *e.g.*, *Minnesota Mining and Manufacturing Co.* v. *NLRB*, 415 F. 2d 174, 177-178 (8th Cir. 1969); *General Electric Co.* v. *NLRB*, 412 F. 2d 512, 516-517 (2d Cir. 1969); *NLRB* v. *David Buttrick Co.*, 399 F. 2d 505, 507 (1st Cir. 1968); *Standard Oil Co.* v. *NLRB*, 322 F. 2d 40, 44 (6th Cir. 1963). As the Second Circuit stated in *General Electric*, *supra*, 412 F. 2d at 517, the exceptions to this general

rule are "rare and confined to situations so infected with ill-will * * * or conflict of interest as to make good-faith bargaining impractical." The law is also clear that a union demand for a mixed-unit negotiating committee is not tantamount to an insistence on company-wide bargaining. *General Electric, supra*, 412 F. 2d at 517-520; *Minnesota Mining, supra*, 415 F. 2d at 178; *Standard Oil, supra*, 322 F. 2d at 44. The issue here, therefore, is whether the Board, upheld by the court of appeals, properly concluded that the Company did not establish a sufficient business justification to refuse to accede to either of the Union's requests to facilitate participation by the travelers and that the Company did not show that the Union's actual intent was to engage in Company-wide bargaining. Resolution of these issues turns on the particular facts of this case and raises no issue warranting consideration by this Court.[6]

There is no merit to the Company's contention (Pet. 10) that the Board's position amounts to a "*per se*" rule that precludes employers from bargaining about the conditions under which employees will be released from work to serve as negotiators or the circumstances under which bargaining during non-working hours can be conducted. The Board issued its order on a record that showed (1) that, as in most collective-bargaining situations, the Company could effectively control the

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[6]Regarding the business justification defense, the court of appeals noted (Pet. App. 10a) that "any economic hardship or managerial disruption suffered by the Company is manifestly less than that recognized by the Company from sick leave and vacation time for employees arrived at through collective bargaining." And with respect to the Company's assertions that the Union's position regarding the travelers masked an unlawful intent to compel Company-wide bargaining, the Board correctly found (Pet. App. 18a-19a) that the Company's charges were not borne out by the actual course of the 1975-1976 bargaining.

composition of the Union bargaining team by insisting on scheduling negotiations at times during which it refused to grant unpaid leave to certain of the selected bargaining representatives, (2) that prior to the issuance of the unfair labor practice complaint the Company had refused to agree to either procedure suggested by the Union for enabling the travelers to attend negotiating sessions (see page 5, note 4, *supra*), and (3) that the Company had not proposed any other solution for accommodating the Union's desire to have the travelers participate. Indeed, since it was the Company's position that participation by the travelers was an unlawful attempt by the Union to compel Company-wide bargaining, the question whether the Company was free to negotiate the terms of their participation was not presented.[7]

On this record, the Board's order is entirely reasonable. Under that order, the Company is free to bargain during working hours while granting unpaid leave to travelers, to bargain outside of working hours while refusing to grant such leave, or to use combinations of the two approaches. And the Company of course remains free to urge reasonable positions with regard to the duration or frequency of sessions held outside normal working hours and the number of non-unit employee negotiators granted leave. See, *e.g.*,

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[7]Thus, contrary to the Company's contention (Pet. 11), no conflict is presented with the Board's conclusion in *Axelson, Inc.*, 234 N.L.R.B. 414, 415-416 (1978), enforced, 599 F. 2d 91 (5th Cir. 1979), that payment of production wages lost to employee negotiators during bargaining is a mandatory subject of bargaining. In any event, the payment of wages to negotiators is obviously a different subject from an arrangement for employees to negotiate on unpaid leave time.

Concord Docu-Prep, Inc., 207 N.L.R.B. 981, 984 (1973); *Westinghouse Electric Corp.*, 132 N.L.R.B. 406, 407 & n.2 (1961).[8]

The reliance of the Company and amicus curiae Edison Electric Institute (Pet. 9-10; Amicus Br. 3) on *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), is equally unavailing. There the Court disapproved a Board order that required the employer to grant the union a collective-bargaining agreement clause providing for a checkoff even though the employer had not agreed to such a contractual provision in collective bargaining. Here, the Board's order does not require the employer to accede to any collective-bargaining clause, but merely to accommodate reasonably the Union's right to choose its negotiators.

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[8]The Board thus did not, as the Company suggests (Pet. 10), hold that employers must allow "unlimited numbers of employees off from work * * * to engage in unlimited numbers of * * * negotiations * * * in unlimited numbers of bargaining units * * *." The Union's request here involved four employees out of 700 represented by the Union, four bargaining units, and 11 negotiating sessions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-564

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF AMICUS CURIAE EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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BRIEF OF AMICUS CURIAE EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Edison Electric Institute respectfully supports the request of Petitioner Indiana & Michigan Electric Company that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit. The parties to this lawsuit have consented to the filing of this amicus brief, as evidenced by letters from the parties filed with this brief.

QUESTION PRESENTED [1]

Whether the National Labor Relations Board can, in the absence of proof of anti-union or discriminatory motivation, force an employer to concede to a union

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[1] The Edison Electric Institute concurs in the Opinions Below, Jurisdiction, Statutory Provisions Involved and Statement of the Case sections of the Petition for a Writ of Certiorari filed by Indiana & Michigan Electric Company in this case.

demand to either bargain outside of working hours or to release employees in other bargaining units from work in order to attend negotiations.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IMPROPERLY RESOLVES CRITICALLY IMPORTANT AND RECURRING QUESTIONS CONCERNING COLLECTIVE BARGAINING IN CONFLICT WITH PRINCIPLES OF FEDERAL LABOR POLICY ESTABLISHED BY CONGRESS AND BY THIS COURT.

In this case, the National Labor Relations Board has, for the first time, established a *per se* rule requiring employers either to negotiate outside of working hours or to release employees in other bargaining units from work in order to attend negotiations that do not directly affect their wages, hours or working conditions. This novel obligation, enforced by the Seventh Circuit, has been imposed in a case where there is no proof of anti-union animus or discriminatory motivation, but rather where the employer had legitimate business reasons for its refusal to accede to the union's proposal on the conduct of negotiations. The result of this holding is thus to require all employers in this country to concede important issues involving the operation of their businesses as well as the conduct of negotiations, issues that the National Labor Relations Board and the courts have previously ruled need not be conceded at the bargaining table.

Requiring concessions on such critical issues is plainly contrary to congressional intent expressed in Section 8(d) of the Act and flies in the face of repeated admonitions of this Court. Section 8(d) of the National Labor Relations Act specifically states that the "obligation [to bargain] does not compel either party to agree to a proposal

or require the making of a concession." 29 U.S.C. § 158(d) (1970). Time and again, this Court has interpreted Section 8(d) to mean precisely what it says: that the National Labor Relations Board may not compel agreement on substantive terms between parties to collective bargaining negotiations. Thus, in *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), this Court held that an employer's steadfast refusal to agree to a union dues check-off provision was not in and of itself a violation of Section 8(a)(5) of the Act, stating:

> It would be anomalous indeed to hold that while § 8(d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad-faith bargaining, the Act permits the Board to compel agreement in that same dispute. The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

397 U.S. at 108 (footnotes omitted). To the same effect, this Court held in *NLRB* v. *American National Insurance Co.*, 343 U.S. 395 (1952), that an employer's refusal to make concessions regarding a management rights proposal was not a violation of Section 8(a)(5).

The meaning of Section 8(d), and the lesson of *H.K. Porter* and *American National Insurance*, is clear: the National Labor Relations Board may not, in the guise of defining the duty to bargain, compel concessions on substantive contract provisions. Yet the Board in this case has ignored these rulings and has directly ordered the

Petitioner, and indirectly ordered all of American industry, to concede vitally important questions to unions or be guilty of a refusal to bargain. As stated by Judge Wood, in dissent below:

> There was no collective bargaining agreement negotiated between the union and the company permitting employees to take time off to bargain outside their units at other locations. With this case as precedent there will no longer be any need for a union to bargain on that issue. The company has lost any right to bargain for some reasonable control or limitation on the practice. The union has gained a new bargaining tactic subject to obvious abuse. No limitation is placed on the number of employees nor the amount of time off that the union can now impose on an employer against its business judgment.

599 F.2d at 192. Under this decision, an employer has two unpalatable options: allow an unlimited number of nonunit employees an unlimited amount of release time, with disastrous impact upon efficiency, or bargain outside of working hours, with potentially disastrous impact upon the bargaining process. There is absolutely no warrant for imposition of this choice under the Act.

The decision below not only conflicts with decisions construing Section 8(d), but also with NLRB and circuit court decisions holding that concessions may not be compelled on the very issues involved in this case. The NLRB has previously held that the duty to bargain in good faith does not require either party to agree to bargain outside of working hours.[2] Nor does the Act require an employer to release employees from their work in order to attend negotiations concerning their own wages, hours and working conditions.[3] In the instant case, the

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[2] *Tennessee Chair Co.*, 126 N.L.R.B. 1357 (1960).

[3] *Borg Warner Controls*, 198 N.L.R.B. 726 (1972).

Board implicitly recognizes the continuing vitality of these doctrines,[4] yet concludes that refusal to concede on these two issues amounts to an unfair labor practice. The Board's ability to synthesize illegality from admittedly legal conduct cannot be condoned.[5]

The Board's basic error here lies in its hyperextension of the doctrine, enunciated in *General Electric Co.* v. *NLRB*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970), that either party has the right to freely choose its bargaining representatives. This case in no way turns on this principle, for as Judge Wood notes in dissent, 599 F.2d at 192, the Board has never required either party to sacrifice its vital interests in order to accommodate the other party's choice of representative. Indeed, the Board has frequently held that the unavailability of one side's representative does not excuse a refusal to meet,[6] thus implying that the freedom to choose a bargaining representative subsumes the choice of an individual in a position to attend bargaining sessions. Where, as here, the union representative is unable to meet because the employer must continue to operate its

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[4] 229 N.L.R.B. at 576.

[5] Similarly, the Fifth Circuit ruled in *Axelson Industries Inc.* v. *NLRB*, 101 L.R.R.M. 3007 (5th Cir. 1979), *enforcing* 234 N.L.R.B. No. 49 (1978), that payment of employees for time spent in negotiations is a mandatory subject of bargaining upon which neither party must concede. The issue of release time, or the timing of negotiations, is no less critical or mandatory.

[6] *Pepper & Tanner, Inc.*, 197 N.L.R.B. 109, 121-22 (1972), *enforced*, 474 F.2d 1256 (6th Cir. 1973); *Franklin Equipment Co., Inc.*, 194 N.L.R.B. 643, 645-46 (1972); *Insulating Fabricators, Inc., Southern Division*, 144 N.L.R.B. 1325, 1326-29 (1963), *enforced*, 338 F.2d 1002 (4th Cir. 1964); *Radiator Specialty Co.*, 143 N.L.R.B. 350, 369 (1963), *enforced*, 336 F.2d 495 (4th Cir. 1964); *Solo Cup Co.*, 142 N.L.R.B. 1290, 1295 (1963), *enforced*, 332 F.2d 447 (4th Cir. 1964); *"M" System Inc., Mobile Home Division Mid-States Corp.*, 129 N.L.R.B. 527, 549 (1960); and *Skyland Hosiery Mills, Inc.*, 108 N.L.R.B. 1600, 1605 (1954).

business, nothing in the Act requires the employer to sacrifice its interests in order to accommodate the union. As noted above, an employer may insist upon negotiating during working hours. Having done so, it should not be required to harm its business because the union has chosen a representative that is unable to meet. By failing to give any weight to Petitioner's legitimate interests in operating its business, the Board has in effect forced employers to become guarantors of the availability of union representatives. If the ruling below is allowed to stand, it will radically transform collective bargaining in this country in a fashion never intended by Congress, and specifically contrary to expressed congressional intentions and prior decisions of this Court.

CONCLUSION

For the reasons expressed above, the Edison Electric Institute respectfully prays, as an *amicus curiae*, that a Writ of Certiorari issue in this case.

Respectfully submitted,

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